TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1910.

No. 62.

THE SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED NOVEMBER 26, 1910.

(26,854)

(26,834)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1919.

No. 248.

THE SEABOARD AIR LINE RAILWAY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

	Original	Print.
Petition and amended petition	1	1
General traverse	5	3
History of proceedings	5	3
Order of court, entered January 7, 1918	6	3
Findings of fact, conclusion of law, and opinion of the court	7	4
Judgment of the court	27	25
Further proceedings	28	25
Note of claimant's appeal, &c	28	25
Clerk's certificate	29	25

JUDD & DETWEILER, (INC.), PRINTERS, WASHINGTON, D. C., JUNE 17, 1919.

1 In the Court of Claims.

No. 24915.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

I. *Petition and Amended Petition.*

On April 18, 1904 the claimant filed its original petition.

Subsequently, to wit, on February 13, 1917, the claimant, by leave of court, filed its amended petition which is as follows:

Amended Petition.

Petitioner, by leave of court, files this its amended petition, and says:

I.

Petitioner is a corporation organized under the laws of the State of Virginia. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina and Georgia. It now owns and operates also railroads which at those times belonged to other corporations which have since been merged into it and to whose rights, in the matters hereinafter stated, it has therefore succeeded. One of said corporations was the Florida Central and Peninsular Railroad Company.

II.

Upon movements of United States troops and freights appurtenant thereto in the years 1897, 1898, 1899, 1900, 1901, 1902 and
2 1903, petitioner and those corporations to which it has succeeded, in some cases by an established general practice of the railway companies of the country, and in other cases by the terms of a special contract made by a bid and acceptance thereof by an authorized officer of the United States army, was obligated to transport free of charge all personal baggage of each man of such troops to the amount of 150 pounds. In making payment for such movements, however, the accounting officer of the United States deducted a number of pounds of freight equal to 150 times the number of men transported, and withheld the compensation accruing on those amounts of freight; ignoring the difference between baggage, the property of the men, and military equipage, stores and supplies, which were the property of the United States.

III.

In many of the cases where such deductions were made the men had only hand baggage, which they carried in the passenger cars, and no baggage whatever was included in those weights of freight for which part payment was made. In other cases, although full facilities were afforded by claimant or said other railroad companies for separate loading and transporting of the baggage, such as the men did not keep with them in the passenger cars, this baggage was loaded by the officers of the army into freight cars and was mingled and confused with the freight and not separately weighed, and the weight of the same cannot now be ascertained. On transactions of both of these classes, therefore, petitioner is entitled to be reimbursed the entire amounts deducted. In those cases where the baggage was separated from freight and weighed separately petitioner is entitled to recover the amounts deducted for freight in excess of the
3 weight of baggage actually transported but classed by the accounting officers as freight. In no case was the average weight of baggage transported as high as 150 pounds per man.

IV.

In said movements large quantities of camp equipage, ammunition and other military stores and supplies were transported. To said shipments there were applicable tariffs and classifications theretofore agreed on between petitioner and other railroad companies within its territory, including petitioner's said predecessors in title, and duly recognized by the accounting officers of the United States as fixing the true rates to be paid by the United States; but in many cases the accounting officers of the army, while recognizing that compensation was due with respect to the same, treated the same as of lower classes of freight than to those in which they truly belonged and allowed to petitioner or its said predecessors in title only the smaller amounts proper to those lower classes.

V.

The deductions thus unlawfully made from claimant's due compensation aggregate twenty-seven thousand dollars; for which sum, therefore, it prays judgment; no part of the same having been paid, and its claim to the same not having been assigned.

THE SEABOARD AIR LINE RAILWAY,
By BENJ. CARTER, *Its Attorney in Fact.*

4 DISTRICT OF COLUMBIA, *ss:*

Before me, Francis L. Neubeck, a Notary Public in and for said District, appeared Benj. Carter, subscriber of the foregoing petition, who being by me sworn, makes oath and says that the allegations of

said petition are true to the best of his knowledge, information and belief.

BENJ. CARTER.

Subscribed and sworn to before me this 5th day of January, 1917.

[SEAL.] FRANCIS L. NEUBECK,
Notary Public, D. C.

5 II. *General Traverse.*

Court of Claims.

No. 24915.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by Rule 34.

III. History of Proceedings.

On February 27, 1917 the argument of the case on merits was begun by Mr. Benjamin Carter for the claimant, and continued by Mr. Assistant Attorney General Huston Thompson for the defendants, and further argued by Mr. Benjamin Carter for the claimant. On February 28, 1917 Mr. Carter concluded his argument for the claimant and the case was submitted.

On April 9, 1917 the court filed findings of fact and conclusion of law dismissing petition, with an opinion by Downey, J.

On June 7, 1917 the claimant filed a motion to set aside the judgment of April 9, 1917.

On October 15, 1917 the claimant was allowed, in open
6 court, to withdraw its motion filed June 7, 1917, and granted leave to file an amended motion and given to Nov. 1, 1917 to file brief in support thereof.

On October 15, 1917 the claimant filed its amended motion to set aside judgment.

IV. *Order of Court on Claimant's Motion.*

Entered Jan. 7, 1918.

It is ordered by the court That the claimant's motion for a rehearing be and the same is hereby overruled.

The former findings, judgment and opinion are withdrawn and

amended findings are this day filed with conclusion of law dismissing petition. Opinion by Judge Downey.

By THE COURT.

7 V. *Findings of Fact, Conclusion of Law, and Opinion of the Court by Downey, J.*

Entered January 7, 1918.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The Seaboard Air Line Railway is a corporation formed, as hereinafter shown, by the consolidation of a corporation of the same name with another corporation, the Florida Central & Peninsular Railroad Co.

The Seaboard Air Line Railway was a corporation originally organized under the laws of the State of Virginia, and by duly authorized consolidations or mergers with corporations operating railroads in those States had become a consolidated corporation under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina, and Georgia.

The petitioner, the Seaboard Air Line Railway, a corporation formed as hereinbefore stated, now owns and operates railroad lines in the said States and also the railroad lines that, until the consolidation herein mentioned, belonged to another corporation, the Florida Central & Peninsular Railroad Co.

On the 27th day of June, 1903, a company, described as "the Seaboard Air Line Railway, a consolidated corporation, organized and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia, and Alabama," and the Florida Central & Peninsular Railroad Co., described as "a corporation duly incorporated and operated under and by virtue of the laws of the States of Florida and Georgia," entered into an agreement called "Articles of agreement of merger and consolidation," prescribing "the terms and conditions of said merger and consolidation and the mode of carrying the same into effect."

8 Article I was as follows:

"The capital stock, franchises, railroads, estates, and properties, real, personal, and mixed, of the said Florida Central & Peninsular Railroad Co. shall be, and they are hereby, united, merged, and consolidated with the Seaboard Air Line Railway, and are to be hereafter owned and controlled as one railroad company."

Article II was as follows:

"The name of said company so formed by the merger and consoli-

dation and union of said railroad companies shall be, and is, the Seaboard Air Line Railway."

Article III prescribed the number of directors of said consolidated company, their officers, and the names of those who shall act as directors and officers until the first annual meeting of the stockholders.

Article IV prescribed where the offices of the company should be located, and Article V prescribed where and when the annual meeting should be held and procedure thereat.

Article VI provided that the capital stock of said consolidated company should be $100,000,000, divided into 1,000,000 shares of $100 each, divided further into 750,000 shares to be "presently issued" and 250,000 shares "issuable hereafter," the 750,000 shares to be further divided into 250,000 shares of preferred stock and 500,000 shares of common stock.

Article VII provided for the distribution of profits, and Article VIII provided "the manner of converting the capital stock of each of said companies into that of the consolidated company," in which, as to the stock of the Florida Central & Peninsular, it is provided:

"2. To the holders of preferred stock of Florida Central & Peninsular Railroad Co. one share of the preferred stock and one share of the common stock of the consolidated company for each share of the preferred stock of said Florida Central & Peninsular Railroad Co.

"To the holders of the common stock of said Florida Central & Peninsular Railroad Co. one share of the common stock of the consolidated company for each share of the common stock of said Florida Central & Peninsular Railroad Co.

"But in the exchange of stock, both common and preferred, of the Florida Central & Peninsular Railroad Co. for the common and preferred stock, respectively, of said Seaboard Air Line Railway, no exchange is to be made for the stock of said Florida Central & Peninsular Railroad Co., either common or preferred, now held and owned by said Seaboard Air Line Railway."

Article IX contained authority for the execution of an indenture of mortgage and Article X was as follows:

"Upon, from, and after the execution of these articles of merger and consolidation, and the ratification thereof by the stockholders of the constituent companies and the filing of the same as required by law, the rights, privileges, and franchises of each of said constituent companies, and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all property, rights of way, and every other interest shall be as effectually the property of the consolidated company as they were of the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities, and dues of said companies shall thenceforth attach to the consolidated company and be enforceable against it to the same extent as if said debts, liabilities, and dues had been incurred by it."

Article XI directed that "The president or other proper officer of the said consolidated company shall file a counterpart or copy of these Articles of Agreement of Merger and Consolidation, duly authenticated, with the proper officers in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida." The copy in evidence is certified by the secretary of state of the State of Florida as—

"a true copy of articles of agreement and consolidation of Seaboard Air Line Railway and Florida Central & Peninsular Railroad Co., dated June 27, 1903, forming the Seaboard Air Line Railway, a corporation created by and existing under the laws of the States of Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the 15th day of August, 1903."

The said consolidation was made under authority of the statutes of the State of Georgia and the statutes of the State of Florida.

The Seaboard Air Line Railway, as created under the terms of said agreement, is the petitioner in this case, and its petition was filed April 18, 1904.

II.

At the times hereinafter stated movements of United States troops, with freight belonging to the United States, and baggage of the troops, occurred over the line of railroad then operated by said Florida Central & Peninsular Railroad Co., all either being wholly over or terminating on the lines of said company, and none of said movements were over the lines of railroad then owned by the plaintiff herein.

III.

All settlements for movements here involved were made by a disbursing quartermaster of the Army, on presentation of the original bills of lading, on the basis of weights shown thereon. In cases where it appeared by notation on the bill of lading that an amount of baggage claimed free was carried in carload lots, such cars did not appear in the voucher among the items of charge on account of the particular bill of lading referred to by number, and no payment therefor was made. In other cases deduction was made from the total weights of certain classes of freights carried, upon the basis of 150 pounds for each officer and enlisted man shown to have been transported. All settlements were made with the Florida Central & Peninsular Railroad Co., the final carrier, and were for the full sum stated in the vouchers issued therefor, which sums it accepted and retained and gave upon said vouchers its receipt in full therefor, and made no protest. The several movements are hereinafter referred to by the item number given to them in claimant's amended request for findings of fact.

IV.

Item 1 is in connection with the transportation of 49 officers and 934 men of the Fifth Maryland Volunteer Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, on bill of lading No. 3, dated June 2, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 8 cars of stock and 15 cars of wagons, harness, tentage, company property, and ammunition of 20,000 pounds each, 3 cars of subsistence stores of a total weight of 29,000 pounds, 1 car of forage of 13,000 pounds, and 1 car of baggage of 11,000 pounds. The Florida Central & Peninsular Railroad was paid for the movement on voucher receipted by its treasurer in full, for said 8 cars of stock, $636. From the total weights of the other 20 cars there was deducted 147,450 pounds, and it was paid for 205,550 pounds at 43 cents per hundred. The receipted voucher upon which payment was made contained, as to this movement, the notation, "Deduct 983 men, at 150 each, 147,450."

Item 2 is in connection with the transportation of 46 officers and 985 men of the Sixty-ninth New York Volunteer Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, by bill of lading No. 4, dated June 2, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 8 cars of stock and 15 cars loaded with Army wagons containing harness, tentage, ammunition, and company property, billed at 20,000 pounds each, 1 car of subsistence stores of 16,000 pounds, and 1 car of forage of 10,500 pounds. From the total weights of these 17 cars there was deducted 154,650 pounds as the baggage allowance for 1,031 men at 150 pounds each, and the Florida Central & Peninsular Railroad was paid on its receipted voucher for 171,850 pounds at 43 cents per hundred. The voucher contained the notation, "Deduct 1,031 men, at 150 each, 154,650." For the 8 cars of stock it was paid $636.

Item 3 is in connection with the transportation of 54 officers and 997 men of the Second New York Volunteer Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, by bill of lading No. 2, dated July 1, 1898, issued by the Southern Railway Co. at Rossville, Tenn., 9 cars of stock, 17 cars of Army wagons loaded with United States property of 20,000 pounds each, 1 car containing 7,980 pounds of harness and saddles and 5,950 pounds of forage, 1 car company property (baggage), weight 11,500 pounds, 1 car subsistence stores and tentage, weight 12,000 pounds, 1 car headquarters and company property (baggage), weight 20,500 pounds, 1 car company property and stoves, weight 18,500 pounds, and 1 car subsistence stores and forage, weight 11,500 pounds. On the bill of lading was the notation, "Deduct 150 pounds per passenger for 1,051 passengers, being 157,650 pounds. Net weight to be paid for 450,280 pounds." The Florida Central & Peninsular Railroad was paid by voucher receipted in full for 9 cars of stock, of 20,000 pounds each, $715.50, and for 270,280 pounds net in the other cars at the rate of 43 cents per hundred.

11 Item 4 is in connection with the transportation of 50 officers and 953 men of the First District of Columbia Volunteer

Infantry from Rossville, Tenn., to Tampa, Fla., with which there was transported, by bill of lading No. 1, dated June 1, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 7 cars of stock, 15 cars of wagons loaded with tentage and ammunition of 20,000 pounds each, 1 car of subsistence stores and bacon of 17,000 pounds, 1 car of subsistence stores and hay of 12,000 pounds, 1 car of grain and bacon of 14,000 pounds, 1 car baggage and company property of 18,000 pounds, 1 car of baggage and ammunition of 13,000 pounds, and 1 car of company property and baggage of 14,500 pounds. On the bill of lading was the notation, "Deduct 150 pounds baggage per passenger for 1,002 passengers, being 150,300 pounds, making net amount to be paid for 378,200 pounds." The Florida Central & Peninsular Railroad was paid, on its receipted voucher, for said 7 cars of stock $556.50, and on account of the freight moved in the other cars it was paid for 238,200 pounds at 43 cents per hundred.

Item 16 is in connection with the transportation of 1,185 officers and men of the First South Carolina Regiment from Rossville, Tenn., to Jacksonville, Fla., with which there was transported, by bill of lading No. 002, dated July 29, 1898, issued at Rossville, Tenn., by the Southern Railway Co., 6 cars of stock, 12 cars of wagons of 20,000 pounds each, 2 cars of tentage of 24,000 pounds each, 2 cars of subsistence stores of 20,000 pounds each, 1 car of forage of 20,000 pounds, and 1 car of baggage and hospital stores of 10,000 pounds. The rates indicated on the bill of lading were: Stock, $60 per car; wagons, $40 per car; tentage, $100.80 per car; subsistence stores, 53 cents per cwt.; forage, $30 per car; and baggage and hospital stores, 66 cents per cwt. On the face of said bill of lading was the following notation: "Less baggage allowance of 150 pounds for each enlisted man and officer (1,185 officers and men). Net weight, 300,250 pounds." The Florida Central & Peninsular Railroad was paid, on a voucher receipted in full, 20,250 pounds at 30 cents per hundred, 20,000 pounds at 15 cents per hundred, 240,000 pounds at 20 cents per hundred, and for 1 car stock at $60. The voucher upon which payment was made showed the deduction 177,750 pounds as free allowance for 1,185 officers and men.

The bills of lading in items 1, 2, 3, and 4 contain the notation, "Special rates as per letters of Col. J. G. C. Lee, Chief Quartermaster, Department Gulf, dated Camp Geo. H. Thomas, May 30, and 31, 1898." The letter of May 30 referred to, and referring to these four movements, stated:

And the rates agreed upon are as follows:

Officers and men	each	$12.58
Camp equipage, harness, etc	per 100 pounds	.41¾
Wagons and ambulances	per 100 pounds	.29¾
Horses and mules	per car	76.57

In his letter of May 31, Colonel Lee said:

Since writing you yesterday the railroad companies have raised their rates, and I now beg to insert the following rates as to freight:

Camp equipage	per 100 pounds..	$0.83 4/10
Wagons and ambulances (set up or knocked down)	....	.43
Horses and mules	per car..	79.50

The passenger rate is as heretofore advised.

12 The weights herein specified are subject to a reduction of 150 pounds per man, which please deduct from total bill of lading. The enlisted men are, as a matter of course, entitled to carry their side arms in their train. Please instruct the shipping quartermaster accordingly.

With reference to the movement referred to in item No. 16 there is no evidence in the record as to the rate applicable thereto otherwise than as stated in the bill of lading.

All of these five movements, originating on the Southern Railway, were over the lines of the Florida Central & Peninsular Railroad as the final carrier, and payment was made to said final carrier for the service rendered upon vouchers stating the amount to be paid for each of said movements, which vouchers were receipted by the treasurer of the Florida Central & Peninsular Railroad Co., as in full and without protest. Thereafter the Southern Railway Co. commenced an action in this court against the United States, No. 24913A, wherein it sought to recover on account of alleged unauthorized deductions of baggage in connection with a large number of movements of troops of the United States, among which it included the five movements above referred to as items 1, 2, 3, 4, and 16, in addition to which allegation, with reference to unauthorized deductions on account of baggage, it also alleged in its petition in that case, the application of erroneous rates in the payments made on account of the various items of transportation therein included, among which were the five items hereinbefore referred to. The said five items of transportation for which recovery was sought in that case was the same transportation as that sought to be recovered in said five items in this case, evidenced by said bills of lading above enumerated. On the 8th day of February, 1909, in said case No. 24913A, the Southern Railway Co., which was the initial carrier in all of said five movements, and issued all of said bills of lading aforesaid, was by this court awarded judgment in the sum of $23,318.53.

It is shown by the findinfigs of fact in that case that so much of that judgment as was predicated on the five movements here involved was on account of determined excessive deductions of personal baggage.

Item 5.

In connection with the transportation of 50 officers and 1,339 men of the Fifth Ohio Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported, on bill of lading No. 158, dated, July 22, 1898, issued at Tampa, Fla., by the Florida Central & Peninsular Railroad Co., 7 cars of stock, 2 cars of forage, and 13 cars of wagons and ambulances. On said bill of lading, after the enumeration of the above cars by car number and weight, there was the following notation: "And 13 cars baggage free allowance of 150

pounds each for 50 officers, 1,317 enlisted men, and 29 teamsters." Payment was made for 7 cars of stock at $19.50 per car, and for said 2 carloads of forage, of 50,000 pounds, as class D freight, at 8 cents per hundred pounds, and for said 13 cars of wagons, etc., of 260,000 pounds, as sixth-class freight, at 23 cents per hundred pounds. No payment was made for the 13 cars of baggage.

Item 6.

In connection with the movement of 42 officers and 1,248 men of the Sixty-ninth New York Volunteer Infantry from Tampa,
13 Fla., to Fernandina, Fla., there was transported, by bill of lading No. 174, dated July 24, 1898, issued at Tampa, Fla., by the Florida Central & Peninsular Railroad Co., 7 cars of horses and mules, 1 car of forage, 13 cars of loaded wagons, and 1 car of ammunition, all of 20,000 pounds each. Following the enumeration of said cars by number on said bill of lading there was the following notation: "And 13 cars baggage free allowance of 150 pounds each for 42 officers, 1,225 enlisted men, and 30 teamsters."

Item 7.

In connection with the movement of 47 officers and 1,234 men of the Third Regiment Ohio Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported, by the Florida Central & Peninsular Railroad, on bill of lading No. 180, issued by said railroad at Tampa, Fla., on the 25th of July, 1898, 2 cars of forage, 7 cars of stock, and 13 cars of wagons, all of 20,000 pounds each. On said bill of lading, in addition to said cars, enumerated thereon by number, was the notation: "And 13 cars baggage free allowance 150 pounds per man for 47 officers, 1,213 enlisted men, and 21 teamsters."

Item 8.

In connection with the transportation of 46 officers and 1,241 men of the Second New York Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported, by the Florida Central & Peninsular Railroad, by its bill of lading No. 193, issued by it at Tampa, Fla., under date of July 26, 1898, 7 cars of stock, 15 cars of wagons, and 2 cars of forage, all of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 10 cars baggage free allowance for 46 officers, 1,229 enlisted men, and 14 teamsters, 150 pounds each."

Item 9.

In connection with the transportation of 3 officers and 100 men of the Third Division, Fourth Army Corps, from Tampa, Fla., to Fernandina, Fla., there were transported, by the Florida Central & Peninsular Railroad, by its bill of lading No. 205, issued at Tampa, Fla., and dated July 28, 1898, 4 cars of stock, 5 cars of wagons, 1 car

of hospital stores, and 1 car of forage. In addition to said cars enumerated by number on said bill of lading there was given the number of an additional car with the notation following: "Free allowance of baggage for 3 officers and 104 enlisted men, 150 pounds each."

Item 10.

In connection with the transportation of 47 officers and 933 men of the First Regiment Ohio Volunteer Infantry from Port Tampa, Fla., to Fernandina, Fla., there was transported, over the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 207, issued at Port Tampa on the 28th of July, 1898, by the Plant System Railroad, 8 cars of stock, 13 cars of wagons, and 14 1 car of ammunition, of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 13 cars baggage free allowance of 150 pounds per man for 47 officers, 933 enlisted men, and 14 teamsters."

Item 11.

In connection with the transportation of 46 officers and 1,260 men of the One hundred and fifty-seventh Regiment of Indiana Volunteer Infantry from Port Tampa, Fla., to Fernandina, Fla, there was transported by the Plant System Railroad and the Florida Central & Peninsular Railroad, on bill of lading No. 214, issued at Port Tampa, July 29, 1898, by the Plant System, 8 cars of stock, 15 cars of wagons, and 2 cars of forage, all of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 10 cars baggage free allowance of 150 pounds per man for 46 officers, 1,246 enlisted men, and 22 teamsters."

Item 12.

In connection with the transportation of 31 officers and 759 men of the Third Regiment Pennsylvania Volunteer Infantry from Port Tampa, Fla., to Fernandina, Fla., there was transported over the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 221, issued at Port Tampa by the Plant System on July 30, 1898, 8 cars of stock, 12 cars of loaded wagons, 2 cars of forage, and 1 car of ammunition, all of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading there was noted thereon the following: "And 10 cars baggage free allowance of 150 pounds per man for 31 officers, 741 enlisted men, and 25 civil employees."

With respect to bills of lading 174, 180, 193, 205, 207, 214, and 221, items 6 to 12, inclusive, payment was made on the same basis and in the same form as shown under item 5 as to bill of lading No. 158, in which case loaded wagons were paid for as sixth-class freight. As to bills of lading 174, 180, 193, and 205, it was paid for at 23 cents per 100 pounds. As to bills of lading 207, 214, and 221, it was paid for at 25 cents per 100 pounds. One carload on bill of lading

174 and 1 carload on bill of lading 205 were paid for as first-class freight at 46 cents per 100 pounds. One carload on bill of lading 207 and 2 on bill of lading 221 were paid for as first-class freight at 50 cents per 100 pounds. All payments were upon vouchers calling for the amounts paid and were receipted in full and no protest is shown. The proper classification of the freights involved in these shipments, from items 5 to 12, inclusive, is not shown and the proper tariff rate is not shown. No payment was made for the cars indicated on the several bills of lading as free allowance of baggage, and no claim therefor was ever made by the Florida Central & Peninsular Railroad Co., or by any other company, before the commencement of this suit by this plaintiff.

Item 13.

In connection with the transportation of 8 officers and 682 men of the Third Regiment Cavalry from West Tampa, Fla., to Fer-
15 nandina, Fla., there was transported over the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 234, issued August 1, 1898, at West Tampa by the Plant System, 13 cars of wagons, 50 cars of stock, 5 cars of forage, and 4 cars of regimental and company property, all of 20,000 pounds each. In addition to said cars enumerated by number, there was upon said bill of lading the following notation: "And 10 cars baggage free allowance of 150 pounds per man for 8 officers and 682 enlisted men." Said bill of lading called for tariff rates. Settlement was made for 50 cars of stock, at $19.50 per car; 5 cars of forage, weight 100,000 pounds, as class D freight, at 8 cents per hundred; 4 cars of regimental and company property of 80,000 pounds, as class 1 freight, at 46 cents per hundred pounds; and 13 cars of wagons of 260,000 pounds, as class 6 freight, at 23 cents per hundred.

Item 14.

In connection with the transportation of 10 officers and 634 men of the Sixth Regiment United States Cavalry from Tampa, Fla., to Fernandina, Fla., there was transported, by the Plant System and the Florida Central & Peninsular Railroad, on bill of lading No. 242, issued August 5, 1898, by the Plant System, 46 cars of stock, 5 cars of forage of a total weight of 131,935 pounds, and 19 cars of wagons of 20,000 pounds each. In addition to said cars enumerated by number on said bill of lading was the notation: "And 14 cars of baggage free allowance 150 pounds per man or 10 officers, 634 enlisted men, and 55 civilian employees." Payment was made to the Florida Central & Peninsular Railroad for 46 cars of stock, at $19.50 per car; 5 cars of forage of 131,935 pounds, as Class D freight, at 8 cents per hundred pounds; for 19 cars of wagons of 380,000 pounds, as class 6 freight, at 23 cents per hundred pounds. No payment was made for said 14 cars of baggage and no claim was made therefor.

Item 15.

In connection with the transportation of 22 officers and 752 men of e Second Regiment of Cavalry from Tampa, Fla., to Fernandina, a., there was transported, by bill of lading No. 254, issued by the ant System at Tampa, Fla., August 3, 1898, over said Plant Sys- n and the Florida Central & Peninsular Railroad, 34 cars of stock, cars of wagons of 20,000 pounds each, and 5 cars of forage of a al weight of 151,016 pounds. In addition to said cars enumerated number on said bill of lading was the notation: "And 14 cars bag- ge free allowance of 150 pounds per man for 10 officers, 782 en- ted men, and 35 civilian employees." For said freight transporta- n the Florida Central & Peninsular Railroad Co. was paid for 34 s of stock, at $19.50 per car; 15 cars of wagons of 300,000 pounds, class 6 freight, at 23 cents per hundred pounds; and 5 cars of for- e of 151,016 pounds, as class D freight, at 8 cents per hundred unds. No payment was made for said 14 cars of baggage and no im was made therefor.

Item 17.

In connection with the transportation of 38 officers and 1,086 men of the First Florida Regiment of Volunteer Infantry from Tampa, Fla., to Fernandina, Fla., there was transported by the Florida Central & Peninsular Railroad Co., on its bill of ding No. 150, issued at Tampa on July 21, 1898, 12 cars of loaded gons of 20,000 pounds each, and 7 cars of stock. In addition to d cars enumerated by number on said bill of lading was the nota- n: "13 cars baggage free allowance for 38 officers, 1,062 enlisted n, and 31 teamsters, 150 pounds each." There was paid the said orida Central & Peninsular Railroad, for said service, for 12 cars of gons of 240,000 pounds, as sixth-class fr-ight, at 23 cents per hun- ed pounds, and for 7 cars of stock at $19.50 per car. No payment s made for said 13 cars of baggage and no claim was made there- .

Item 18.

In connection with the transportation of 9 officers and 220 men, ruits of the United States Army, from Tampa, Fla., to Fer- ndina, Fla., there was transported, on bill of lading No. 255, ued August 4, 1898, by the agent of the Plant System at Tampa, arloads of stock, 5 cars of wagons, and 4 carloads of company operty, all of 20,000 lbs. each. In addition to said cars enumerated number on said bill, there was the notation "And two cars bag- ge free allowance for 2 officers, 211 enlisted men, and 9 teamsters." yment was made to the Florida Central and Peninsular Railroad said freight transportation for 2 cars of stock at $19.50 per car; ars of wagons of 100,000 pounds, as 6th class freight, at 23 cents r hundred pounds; and 4 cars of company property of 80,000 unds, as 1st class freight, at 46 cents per hundred pounds. No

payment was made for said 2 cars of baggage and no claim was made therefor.

Item 19.

In connection with the transportation of 5 officers and 48 men of the 15th Company, United States Signal Corps, from Huntsville, Ala., to Savannah, Ga., there was transported, over the Southern Railway and the Florida Central & Peninsular Railroad, by bill of lading No. 148, issued December 3, 1898, at Huntsville by the Southern Railway Co., 3 cars of stock, 2 cars of equipment, of 24,000 lbs. each, and 4 cars of wagons, of 20,000 lbs. each. Said bill of lading, in addition to said cars enumerated by number thereon, contained the notation "One baggage car free for baggage for 5 officers and 48 men," and the further notation "Agreed rate between Secretary of War and Southeastern Railway Association." The Florida Central & Peninsular Railroad Company was paid for said transportation, for 3 cars of stock, at $100 per car; 2 cars of equipment, of 48,000 pounds, as 5th class freight, at 45 cents per hundred pounds; and for 4 cars of wagons of 80,000 pounds, as 6th class freight, at 35 cents per hundred pounds. No payment was made for said car of baggage and no claim was made therefor.

Item 20.

In connection with the transportation of 11 officers and 90 men of the First Brigade, First Division, First Army Corps, from Knoxville, Tenn., to Savannah, Ga., there was transported, over the
17 Southern Railway and the Florida Central & Peninsular Railroad, by bill of lading No. 28, issued November 28, 1898, at Knoxville by the Southern Railway, 2 cars of commissary, forage, and Army equipment of 24,000 lbs. each; 7 cars of wagons and ambulances of 20,000 lbs. each; and 4 cars of stock. Said bill of lading, following the notation thereon of two cars of commissary, forage, and Army equipment, had upon its face the notation "Less 150 pounds baggage allowed for 101 men." Payment was made for 1 car of 24,000 pounds, as class D freight, at 17 cents per hundred pounds; 1 car of 24,000 pounds, less 15,150 pounds baggage deduction, net 8,850 pounds, as 5th class freight, at 45 cents per hundred pounds; 7 cars of wagons of 140,000 pounds, as 6th class freight, at 35 cents per hundred pounds; and 4 cars of stock, at $87.00 per car. Upon the voucher upon which payment for this transportation was made, and which was receipted by the treasurer of the Florida Central & Peninsular Railroad Co., is the notation "Allow 150 pounds each for 101 men, 15,150 free."

Item 21.

In connection with the transportation of 46 officers and 1,250 men of the 4th Tennessee Regiment Volunteer Infantry from Knoxville, Tenn., to Savannah, Ga., there was transported over the Southern Railway and the Florida Central and Peninsular Railroad, by bill

of lading No. 29, issued November 28, 1898, at Knoxville by the Southern Railway, 11 cars of wagons and ambulances of 20,000 lbs. each; 7 cars of stock, and 14 cars of equipage, commissary, etc., of 24,000 lbs. each. Following the notation on said bill of lading of said 14 cars of equipage, etc., is the notation "Less allowance of 150 equipage, etc., 336,000 pounds less 194,400 pounds, net 141,600 pounds baggage free each, 1,296 men, 46 officers, 1,230 enlisted men, 20 civilians, 194,400." For said movement there was paid to the Florida Central & Peninsular Railroad Co., upon a voucher duly receipted in full by it, for 11 cars of wagons of 220,000 pounds weight, as class 6 freight, at 35 cents per hundred pounds $770; for 14 cars, equipage, etc., 336,000 pounds less 194,400 pounds, net 131,600 pounds, as fifth-class freight, at 45 cents per hundred pounds, $637.20; for 7 cars of stock, 168,000 pounds, at $87 per car, $609; for car rental on a P. H. car No. 2180, $16.14. Notation on settlement: "Allow 150 pounds each for 1,296 men, 194,400 free."

Item 22.

In connection with the transportation of 1,221 officers and men of the First Ohio Volunteer Infantry from Fernandina, Fla., to Jacksonville, Fla., there was transported by the Florida Central & Peninsular Railroad, on its bill of lading No. 22, issued August 27, 1898, at Fernandina, 8 cars of stock, 15 cars of wagons, of 20,000 pounds each, and 8 cars of company and regimental property, of 24,000 pounds each. In addition thereto there was upon the bill of lading the following notation: "12 cars baggage free for 1,221 men and officers." Said bill of lading called for tariff rates. Settlement for said transportation was made with the Florida Central & Peninsular Railroad upon a voucher paid by a disbursing quarter-
18 master of the United States Army, for 8 cars of stock, of 160,000 pounds, at $19 per car, less land-grant deduction, $126.67; for 15 cars of wagons, 300,000 pounds, at 13 cents per hundred pounds, less land-grant reduction, $325; and of 8 cars of company property, 192,000 pounds, at 25 cents per hundred pounds, less land-grant deduction, $400. A receipt of the treasurer of the Florida Central & Peninsular Railroad Co. to the voucher for this service is "in full of the above account and in full of all demands for the service stated therein," and is for the sum of $1,422.36. Why the receipt is for a larger amount than shown by the settlement to have been paid is not shown.

Item 23.

In connection with the transportation of 45 officers and 777 men of the Thirty-first Michigan Volunteer Regiment from Knoxville, Tenn., to Savannah, Ga., there was transported over the Southern Railway, M. & A., Southern Railway, and Florida Central and Peninsular Railroad, by bill of lading No. 28, issued January 9, 1899, at Knoxville, by the Southern Railway Co., 12 cars of equipage and stores of 24,000 pounds each, 16 cars of wagons and ambulances of 20,000 pounds each, and 7 cars of stock. Following the entry upon

said bill of said 12 cars of equipage and stores of 24,000 pounds each is the notation: "Less allowance of 150 pounds baggage for each officer, soldier, and civilian, total, 1,095, 164,250." Payment for said transportation was made to the Florida Central & Peninsula- Railroad Co. for 288,000 pounds, less 164,250 pounds, net 123,750 pounds, as fifth-class freight, at 45 cents per hundred pounds, $556.87; for 16 cars wagons, 320,000 pounds, as sixth-class freight, at 35 cents per hundred pounds, $1,120; for 7 cars of stock, 168,000 pounds, at $87 per car, $609; and for car rental on Keystone car No. 335, $16.

Item 24.

In connection with the transportation of 46 officers and men of the Seventeenth Company, Signal Corps, from Huntsville, Ala., to Savannah, Ga., there was transported by the Southern Railway and Florida Central & Peninsular Railroad, on bill of lading No. 289, issued January 11, 1899, at Huntsville by the Southern Railway Co., 3 cars of stock, 5 cars of wagons of 20,000 pounds each, and 2 cars of company property of 24,000 pounds each. On said bill of lading was the notation: "Car S. R. No. 346, baggage free for allowance of baggage for 46 officers and men. Changing station." Said bill of lading provided that the rate should be the agreed rate between the Secretary of War and the Southeastern Railway Association. The Florida Central & Peninsular Railroad Co. was paid for said transportation for 3 cars of stock at $100 per car; 5 cars of wagons, 100,000 pounds, as class 6 freight, at 35 cents per hundred pounds; and for 48,000 pounds of class 1 freight, at 72 cents per hundred pounds. No payment was made for said car of baggage and no claim was made therefor.

Item 35.

In connection with the transportation of 3 officers and 174 enlisted men of Light Battery A, Second Artillery, from Huntsville, Ala., to Savannah, Ga., there was transported over the Southern Rail-
19 way to Everett, Ga., and over the S., F. & W. to Savannah, Ga., on bill of lading No. 308, issued January 17, 1899, at Huntsville by the Southern Railway Co., 7 cars of stock, 2 cars of company property of 24,000 pounds each, 1 car of forage of 20,000 pounds, 1 car of tents of 24,000 pounds, 3 cars of tent floors of 24,000 pounds each, 3 cars of cannons of 24,000 pounds each, 4 cars of wagons of 20,000 pounds each, and 1 car of baggage of 20,000 pounds. In addition to the enumeration of said cars by number on said bill of lading, there is the notation: "Deduct baggage allowance for 3 officers and 174 men at 150 pounds each." Said bill of lading provides for the rate agreed upon between the Secretary of War and Southeastern Railway Association. The Florida Central & Peninsular Railroad Co. was paid for said transportation for 68,000 pounds, "less allowance for 177 men, at 150 pounds each, 26,550," 41,450 pounds as first-class freight, at 72 cents per hundred, $298.44; for 24,000 pounds as fifth-class freight, at 45 cents per hundred pounds, $108; for 72,000 pounds as fourth-class freight, at 55 cents

per hundred pounds, $396; for 152,000 pounds as sixth-class freight at 35 cents per hundred pounds, $532; for 140,000 pounds, being 7 cars of stock, at $100 per car, $700; or 20,000 pounds class D freight, at 17 cents per hundred pounds, $34; and for rental on car No. 713, $5.45.

V.

Each bill of lading issued in connection with the movements involved herein was prepared by one of the defendant's quartermasters, enumerated the cars involved in the shipment and their contents, and was signed by the agent of the initial carrier, at the point of origin of the shipment, and was receipted by the defendant's quartermaster at the point of destination.

VI.

The bills of lading in the movements referred to as items 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 17, 18, 20, 21, 22, and 23 called for "tariff rates." In items 19, 24, and 25 they called for an "agreed rate between the Secretary of War and Southeastern Railway Association." The proper classification of the freights involved in these movements, if otherwise than as used as the basis of the settlement, is not shown, and proper tariff rates therefore are not shown. The rates referred to in the bills of lading in items 19, 24, and 25 as agreed rates are not shown. The contents of the cars moved with the various bodies of troops, for which no payment or claim for payment was made, are not shown, otherwise than as described in the bills of lading as "baggage," their content weights are not shown, and tariff or other applicable rates thereon are not shown.

VII.

In a resolution adopted at the meeting of the Southeastern Passenger Association, November 15, 1898, referring to the adjustment of rates with the War Department at the meeting held November 2, net cash rates for passenger movements are agreed upon as a basis for bids when requested by the Government, and it is provided that—

Each passenger to be allowed 150 pounds of baggage free of charge. All excess baggage moved with troops on same train or section thereof to be charged for at the rate of 12 per cent per hundredweight of the through passage fare for these movements. The term "baggage" as herein used being understood to mean personal baggage, tentage, camp equipage, accoutrements, and rations needed for immediate use of troops, it being understood that rates for live stock, cannon, heavy ordinance, ambulances, and wagons (set up or knocked down) shall be obtained from the freight departments and that all property connected with the movements of troops shall be loaded and unloaded without expense to the carriers.

Conclusion of Law.

Upon the facts found the court concludes as matter of law that the plaintiff is not entitled to recover and that its petition ought to be and it is dismissed.

Opinion.

DOWNEY, *Judge*, delivered the opinion of the court.

The plaintiff sues in this case for alleged underpayments on certain shipments of freights for the United States in the years 1898 and 1899. The freight movements in question were over the Southern Railway and the Florida Central & Peninsular Railroad, some of them originating on the former road and terminating on the latter, and some entirely over the lines of the latter road. In all cases the Florida Central & Peninsular Railroad Co. was either the sole or the final carrier. In no case was the plaintiff herein the carrier. Such payments as were made, for all the shipments herein involved, were made to the Florida Central & Peninsular Railroad Co. on vouchers stating the amount due on account of each shipment and on which there was paid the full amount thereon shown to be due and which were receipted, in full, by the proper officer of the Florida Central & Peninsular Railroad Co." The claim is on account of the deduction, from the various shipments, of certain cars or weights, which were indicated as baggage allowance for the troops of the United States, in connection with the transportation of which said freight movements occurred, on the basis of 150 pounds for each men transported, and also because of alleged misapplication of classifications and rates in the settlements made. The bills of lading, in each instance, were prepared by the defendant's quartermaster at the point of origin of the shipment, enumerated the cars and the contents thereof involved in the shipments, and were signed, in each instance, by the agent of the initial carrier. At the point of destination they were receipted by the proper quartermaster of the defendant.

The first question which is presented in this case is upon the right of the plaintiff to maintain the action. The ground for the objection assigned is that the plaintiff sues to recover an alleged balance of a claim which if it ever had a legal status belonged to the Florida Central & Peninsular Railroad Co.

The undisputed facts are that the Florida corporation, so called herein for brevity's sake, engaged in the movements of troops and property of the United States during the period of their movements during and at the end of the Spanish-American War. That
21 company was a railroad corporation under the laws of Georgia and Florida. Its lines of road extended from Savannah on the north to points in Florida.

The Seaboard Air Line Railway was a railroad corporation originally chartered in Virginia, but by duly authorized consolidations or mergers with roads in other States had become a consolidated corporation under the laws of Virginia, North and South Carolina,

Georgia, and Alabama. In 1903 the Seaboard company, so called for brevity, as consolidated as last above stated, and the said Florida corporation, both acting by and through their respective officers and by concurrence of their stockholders, entered into an agreement looking to their consolidation into a corporation under the name of the Seaboard Air Line Railway, and the agreement was carried into effect. The law of Georgia (sec. 2173, Code of Georgia, 1895) authorizes a railroad company which has constructed a railroad in said State or any other State to make contract with any other railroad company "that will enable said company to run their roads in connection with each other and to merge their stocks or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company, and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest."

Section 2812 of the general statutes of the State of Florida contains a similar provision to that above quoted from the code of Georgia.

The agreement between said two companies provides and declares that "the capital stock, franchises, railroads, estates, and properties, real, personal, and mixed, of the Florida Central & Peninsular Railroad Co. shall be, and they are hereby, united, merged, and consolidated with the Seaboard Air Line Railway and are hereafter to be owned and controlled by one railroad company"; that the consolidated corporation shall have preferred and common stock; that the holders of the preferred stock in the Florida corporation should receive one share of the preferred stock and one share of the common stock of the consolidated company for each share of preferred stock in the Florida corporation held by them and one share of the common stock of the consolidated company for each share of common stock held by them in the Florida corporation, and that the stockholders in the Seaboard company should receive share for share, whether of preferred or common stock, held in the Seaboard company.

Provision is made for the issue by the consolidated company of its own capital stock in amount exceeding that necessary to take up the shares of stock issued and outstanding by said two companies, and also for the issue by the consolidated company of bonds to the amount of $100,000,000, to be secured by a mortgage or deed of trust upon the properties of the consolidated company.

It is also provided in the agreement that upon the ratification of the same by the stockholders of the constituent companies the rights, privileges, and franchises of each of the constituent companies and all the property, real, personal, and mixed, and all debts due on every account as well as stock subscriptions and other things in action belonging to each of said companies, shall be transferred to and vested in the consolidated company without further act or deed.

22 While the agreement speaks of a merger and consolidation, the name by which the transaction is called is not determinative. The power given by statute was to merge or to consolidate or the purchase of one road by the other. The effect of what was ac-

complished by the agreement and the manifest intention of the parties to the agreement was the creation of a corporation—a legal entity distinct from either of the corporations entering into the agreement. The contract between them speaks of the two "former" companies and of the new or consolidated corporation.

We have no doubt that a new corporation was formed, to which was transferred and assigned the franchises, rights, and properties of each of the former companies.

Yazoo & Mississippi Ry. Co. v. Adams, 180 U. S., 1, 18; Railroad Co. v. Georgia, 98 U. S., 359.

In legal effect the transaction is not different from a purchase by the new corporation of the railroads and properties of the two former companies, so far as the right to collect the debts or claims of either of the former companies is concerned. Nor would there be any difficulty in the new company suing for the recovery of debts due the former companies in the absence of a statute such as section 3477 of the Revised Statutes. That statute forbids assignments of claims against the United States.

Section 3477 of the Revised Statutes has been construed often by this court and by the Supreme Court. One of the latest expressions of the Supreme Court on that question is found in National Bank of Commerce v. Downie, 218 U. S., 345, 353. That case reviews a number of former decisions. Quoting from Spofford v. Kirk, 97 U. S., 484, 488, it approves the following language in that case referring to section 3477: "It would seem to be impossible to use language more comprehensive than this. It embraces alike legal and equitable assignments. It includes powers of attorney, orders, or other authorities for receiving payment of any such claims, or any part or share thereof. It strikes at every derivative interest, in whatever form acquired, and incapacitates every claimant upon the Government from creating an interest in the claim of any other than himself." In Spofford v. Kirk an attempt was made by one of the parties to make a distinction between the validity of an assignment as between the parties and the validity of an assignment so far as the United States were concerned. The court said (p. 490): "We can not say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, and all orders, powers of attorney, or other authority for receiving payment of the claim, or any part thereof, shall be absolutely null and void, that they are only partially null and void; that they are valid and effective as between the parties thereto and only invalid when set up against the Government."

In St. Paul & Duluth R. R. Co. v. United States, 112 U. S., 733, 736, it appeared that a voluntary transfer by mortgage for the security of a debt had been made and that there had been a foreclosure of the mortgage consummated by judicial sale, and it was held that the transfer was within the prohibition of section 3477 of the Revised Statutes. In the opinion by Mr. Justice Matthews it was said: "If the statute does not apply to such cases, it would be difficult to
23 draw a line of exclusion which leaves any place for the operation of the prohibition."

It is true that in construing this statute the Supreme Court has

held that a transfer by operation of law does not come within the inhibition of that statute. Erwin v. United States, 97 U. S., 382, 397.

In Goodman v. Niblack, 102 U. S., 556, it was held that a voluntary assignment for the benefit of his creditors made by an insolvent debtor of all his effects is not different from an assignment in bankruptcy and is not within the inhibition of the statute.

In Bailey et al. v. United States, 109 U. S., 432, it appeared that a power of attorney had been given by the plaintiff and payment had been made to the person holding the duly executed power of attorney. The plaintiff sued the United States and sought a recovery upon the ground that the payment to the person holding his power of attorney was unauthorized because the power of attorney was itself void under the influence of section 3477. It was held that the plaintiff could not recover, and was said (p. 440): "But if the protection of claimants was at all in the mind of Congress when passing the acts of 1846 and 1853, it is quite certain that the courts should not, to the injury of the Government, extend that protection to those that elected not to avail themselves of the provisions of those statutes." The plaintiff having given a power of attorney, and it being unrevoked, and payment having been made thereunder by the Government, the court would not allow the plaintiff to question the propriety of the payment.

In Price v. Forrest, 173 U. S., 410, it was held that an order made by a judicial tribunal having jurisdiction of the parties appointing a receiver of a claim against the Government and ordering the claimant to assign the same to such receiver, to be held subject to the order of the court for the benefit of those entitled thereto, can not be regarded as prohibited by section 3477. The court in that case recognized the rule announced in United States v. Gillis, 95 U. S., 407; Erwin v. United States, supra; Goodman v. Niblack, supra, and St. Paul & Duluth R. R. Co. v. United States, supra.

Manifestly the transfer of the properties and assets of the Florida railroad to the new corporation was not a transfer by operation of law. The agreement between the two corporations under which a third and distinct organization and corporation arose was entirely voluntary on the part of each of them. The terms and conditions upon which the Florida corporation made the transfer of its assets are fully set forth in the agreement between the two companies, and it was only because of said agreement that any transfer was or could be made.

The facts show that the claims now sought to be enforced by the Seaboard Air Line company were claims which are alleged to have accrued to the Florida corporation in the years 1898 and 1899. Part of a claim now asserted was for transportation which originated on the Southern Railway, and it appears that that company brought suit and recovered judgment. The items which are involved in this suit concerning the Southern Railway Co.'s transportation were within the purview of the suit brought by the Southern Railway Co., but were not included in its said suit. It is claimed that the Florida company can now maintain the suit for those items because it was

24 the terminal carrier with whom settlement should have been made. As to all of the items of claim, settlements were made with the Florida company during said years or shortly thereafter. Those settlements are sought to be impeached upon the ground that payments made by the Government on account of transportation of troops and property were incorrect in that the Government officials made deductions on account of baggage when, as it is alleged, the amount of baggage for which deductions should have been made was greatly below the weights upon which settlements were made. In other words, that the Government was not paying the Florida company for property transported and which should have been paid for, and on the contrary has treated as baggage large shipments which were not properly baggage. The Florida company received the vouchers issued in pursuance of the settlements made by the accounting officers. It does not appear that the Florida company made any objection to the settlements, and certainly the Florida company never brought any action in this or any other court to correct the alleged errors. The consolidated company, which is the plaintiff in this suit, was not organized until June, 1903, some four years after the alleged errors had been made against the Florida company. This action was brought in this court in April, 1904, and it seeks to recover on account of the alleged errors in settlements made by the accounting officers with the Florida company.

If under the circumstances stated the status of the Seaboard company in this case is not that of an assignee of a claim, it is difficult to define its status. That assignment was not by operation of law but was the case of a voluntary transfer of claims against the United States before their allowance in direct opposition to the statute. One of the mischiefs sought to be prevented by said statute finds illustration in the case at bar, because it appears that the Florida company brought no action, although more than ample time therefor had elapsed, and that a new corporation which acquired its assets is seeking to enforce claims the settlement of which, so far as the record shows, were acquiesced in by the Florida company. One of the mischiefs which the act was intended to remedy was, as stated in Goodman v. Niblack, 102 U. S., 556, 560, "That, by a transfer of such a claim against the Government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in presenting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggests." Certainly where a claim is transferred by mortgage, which is subsequently foreclosed, the purchaser does not acquire a right to maintain an action against the United States by virtue of that assignment. St. Paul & Duluth R. R. Co., supra. That being true, how can we say that a voluntary transfer by a corporation of all its assets to another corporation is not an assignment within said section? "We can not say, when the statute declares all transfers and assignments of the whole of a claim, or any part or interest therein, * * * shall be absolutely null and void, that they are only partially null and void." Spofford v. Kirk, 97 U. S., 484, 490.

The plaintiff insists that in order to question its right to maintain the action the defendants should have pleaded in abatement, and that having failed to so plead or to file any plea the defendants should not now be heard to say that there was an assignment of the claim. The rules of the court prescribe that in the ent the defendants do not plead within 60 days after suit is brought d notice thereof a general traverse of the petition shall be treated as ed and the case proceed.

The plaintiff relies upon the familiar rule that at common law a ea in bar is a waiver of matter which should be pleaded in abatement.

There are several reasons why the rule invoked by plaintiff should t be applied here. The Court of Claims is not bound by special le of pleading. District of Columbia v. Barnes, 197 U. S., 146, 54.

This court, in Labadie's case, 31 C. Cls., 436, considered the question whether a special plea could be filed after the lapse of the 60 days lowed by the statute for the defendants to plead, answer, or demur, less the time were extended by order of the court, and hold that it as a matter of discretion with the court to allow a plea to be subsequently filed.

But if it were conceded that there is an order of pleading in this urt the principle urged by plaintiff would not be applicable, because e matter of assignment could be pleaded in bar as well as in abatement. Section 159 of the judicial code prescribes what a petition all contain and require the averment that no assignment or transfer of the claim has been made. Section 3477 of the Revised Statutes rbids the assignment of a claim against the United States. The tition in this case does not in terms negative an assignment of nsfer of the claim, but in general terms avers a merger of the o corporations and the succession by plaintiff to the rights of the orida corporation. We have no doubt that the general traverse aches the question of an assignment. In view of the positive terms the statute, it would be the duty of the court to take notice of the ct of an assignment or transfer of the claim sued upon, whether ought to its attention by the defendants or not.

The language of the court in National Bank of Commerce v. ownie, 218 U. S., 345, 356, is apposite: "The present cases are not signments which by operation of law created an interest in the signor's claims against the United States. They are clean-cut cases a voluntary transfer of claims against the United States before eir allowance, in direct opposition to the statute. If any regard atever is to be had to the intention of Congress, as manifested by words—too clear, we think, to need construction—we must hold ch a transfer to be absolutely null and void, and not in itself passg to the appellants any interest, present or remote, legal or equible, in the claims transferred."

The conclusions reached upon the question discussed necessarily termines the right of this plaintiff to maintain this action and quires an adverse judgment.

In our former opinion in this case while announcing the views

above suggested as to the right of the plaintiff to maintain the action we went further and discussed the case as presented by the findings of fact. We called attention to the fact that a stipulation which had been made in a number of cases similar to the one at bar (except the question of assignment), and upon which the other cases had been tried, had been withdrawn by the Assistant Attorney General in this case, who declined to be bound by it. We recognized the rule stated by Judge Howry in the case of Jones & Laughlin v. United States, 43 C. Cls., 178, but we also called attention to the fact that the plaintiff had not asked a continuance of the case when the stipulation was withdrawn. That the withdrawal of the stipulation upon which, up to that time, the plaintiff had relied might be a ground of surprise, which would authorize a continuance in order to enable the parties to supply by proof what they thought was proved by the stipulation, we have no doubt. Plaintiff now by a motion for a rehearing asks leave of the court to supply the requisite proof. Some proof has been taken in other cases of a similar kind to this, but that proof was not brought into this case nor was it considered by the court in the original hearing. Some affidavits are filed with plaintiff's motion for a rehearing, some of which are to the effect that the settlements which were made and which the plaintiff seeks to question, were made by the accounting officers taking the bills of lading with the notations thereon and treating them as accurate exponents of the facts instead of taking the bills presented by the railroad companies themselves. Though the suit was brought in April, 1904, and was not presented to this court for decision until March, 1917, nearly 13 years, we might afford the plaintiff an opportunity of taking additional proof because largely of the surprise to which it was probably put by the withdrawal of said stipulation which affected some but not all of the questions involved in the case. But we are met by the fact that in our opinion plaintiff can not maintain the action because of section 3477 above discussed. And section 165 of the Judicial Code provides: "When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein." Holding to the view we do upon the right of the plaintiff to maintain the action we do not feel justified in putting the parties to the expense of taking additional testimony which can not affect the result.

The findings of fact show the case as it was presented on the former hearing, and our former opinion in the case will be withdrawn and this opinion substituted therefor.

For the reasons stated the motion for a rehearing will be overruled. And it is so ordered.

Hay, Judge; Barney, Judge; Booth, Judge, and Campbell, Chief Justice, concur.

27 VI. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the Seventh day of January, A. D., 1918, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Seaboard Air Line Railway, as aforesaid, shall not have and recover any sum in this action of and from the defendants, the United States; and, that claimant's petition be and it hereby is dismissed.

By THE COURT.

28 VII. *History of Proceedings After Entry of Judgment.*

On March 7, 1918 the claimant filed a motion in relation to findings of fact.

On the same day claimant filed a motion to extend the time for moving amendments of findings of fact to and including April 10, 1918.

On March 11, 1918 both of these motions were overruled by the court.

On March 13, 1918 claimant was granted, in open court, leave to file motion to amend findings.

On May 9, 1918 the claimant filed a renewed motion in relation to findings of fact. This motion was overruled by the court on May 27, 1918.

VIII. *Note of Claimant's Application for Appeal with Motion for Restriction of Transcript.*

On August 15, 1918 the claimant filed an application for appeal to the Supreme Court. Incorporated in said application for appeal was a motion to omit from the record on appeal paragraphs II to VII, inclusive, of the findings of fact. On October 21, 1918 the court ordered that the appeal be allowed.

29 Court of Claims.

No. 24915.

THE SEABOARD AIR LINE RAILWAY

vs.

THE UNITED STATES.

I, Saml. A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law and opinion of

the court by Downey, J.; of the judgment of the court; and of the note of, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington City this 5th day of November, A. D., 1918.

[Seal Court of Claims.]

SAML. A. PUTMAN.
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,834. Court of Claims. Term No. 248. The Seaboard Air Line Railway, appellant, vs. The United States. Filed November 25th, 1918. File No. 26,834.

Supreme Court of the United States

October Term, 1919.

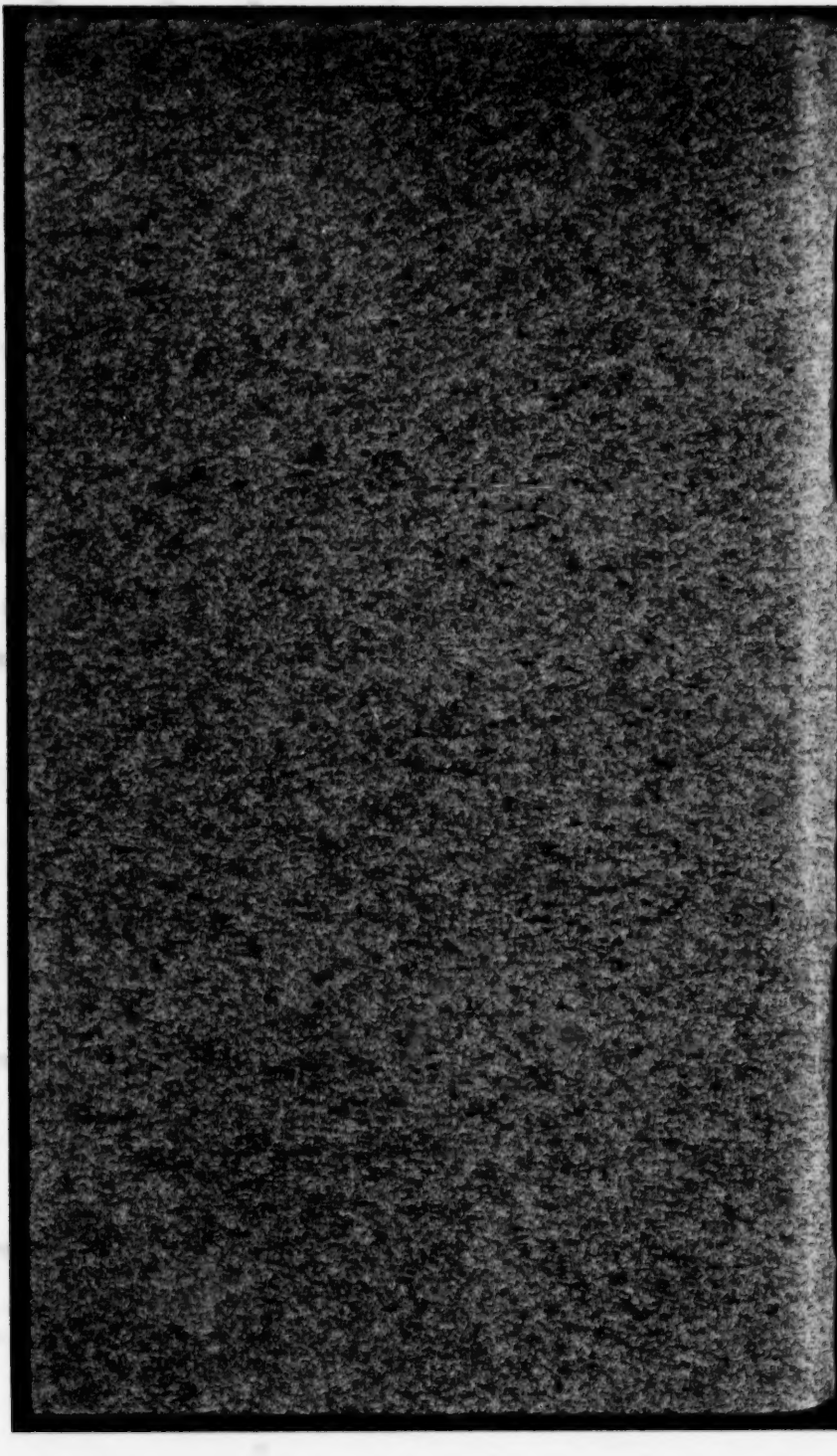
THE CHESAPEAKE AND OHIO RAILWAY
v.
THE UNITED STATES.

No. 61

BRIEF FOR APPELLANT.

BENJAMIN CARTER,
Attorney for Appellant.

PHILIP CARTER POTH,
Of Counsel.



SUBJECT INDEX.

PAGE

Statement of case, including a motion heretofore filed by appellant and now pending 1

The merger of the Florida Central and Peninsular Railroad Company into appellant, by which the former was extinguished, gave appellant title to all its choses in action, including claims against the United States—not being within the purview of Section 3477 of the Revised Statutes 8

Such transfer of claims was by operation of law, the right of merger and the procedure therein being prescribed by statute 9

The defense that the claimant had not a title to the claim sued on was matter of abatement and could not lawfully be raised after issue joined, proofs taken and trial commenced on the merits of the case 10

Section 165 of the Judicial Code does not permit that after issue joined and trial commenced on the merits of a claim the defendant may make the point that the suit is not brought by the proper person 13

When one court, during a period of seven years, has made decisions from six to fifteen times in favor of different claimants upon the same issues and the same proof that is made subsequently in a suit of another claimant, the rule of *stare decisis* requires that the decision in that case also be in the claimant's favor 5

AUTHORITIES CITED.

	PAGE
Spofford *v.* Kirk, 97 U. S. 484	6
Goodman *v.* Niblack, 102 U. S. 556	6, 7, 9
Bailey *v.* United States, 109 U. S. 432	6
Price *v.* Forrest, 173 U. S. 410	6, 7
Erwin *v.* United States, 97 U. S. 392	7, 8
Butler *v.* Goreley, 146 U. S. 303	7, 9
Lanier *v.* Trigg, 6 Sm. & M. (Miss.) 641	7
Commercial Bank *v.* Thompson, 7 Sm. & M. 443	7
Mills *et al. v.* Extrs. of Bland, 76 Ill. 381	7
Bailey *v.* Dozier, 6 How. 23	7
Holdridge *v.* Holdridge's Estate, 53 Vt. 546	7
Watts, Trustee, *v.* Sweeney, 127 Ind. 116	7
Chamberlayne *v.* Nazra, 188 Mass. 454	7
Baker *v.* Union Stock Yards Nat. Bank, 63 Nebr. 801	7
Union Type Foundry Co. *v.* Kittaning Ins. Co. 138 Pa. St. 137	7
Morgan *v.* First Nat. Bank, 93 N. C. 352	7, 8
Clark *v.* Oregon Short Line R. R. Co. 29 Mont. 319	8
Kenyon *v.* Williams, 19 Ind. 44	8
Stewart *v.* Smith, 98 Me. 104	8
Hartog *v.* Memory, 116 U. S. 588	8
Hewitt *v.* Story, 39 Fed. 158	8

Supreme Court of the United States.

October Term, 1919.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 248.

BRIEF FOR APPELLANT.

The suit here brought before this court is almost the last chapter in a somewhat tedious series of proceedings at the Court of Claims, all upon the same ground, brought by seventeen railroad companies. The matter complained of was that frequently during the war with Spain, and sometimes thereafter, confusion occurred, in the shipping and in accounting with the carrier, between personal baggage, which was the personal property of officers or enlisted men of the army, and freights (being supplies or equipment for troops) which were public property. By custom, and, in some cases, by express agreement between quartermaster officers and the carriers, every passenger was entitled to free transportation of his personal baggage to the amount of 150 pounds. There had been controversies before regarding this customary free allowance, and the Comptroller of the Treasury, holding that it included only personal belongings of the officers and soldiers, admonished the Quartermasters (1) that articles of this character must be carried in cars assigned separately to that use or (2) that if they were carried in cars with public property the

weights should be taken separately. These directions were not always observed. Although the carriers for troop movements furnished cars of the kinds called for by the Quartermasters, the latter oftentimes loaded indiscriminately, into baggage cars and freight cars alike, both baggage and freight, and neither upon the bills of lading, which were prepared by them, nor in other way did they make any record of the separate weights; then, when they came to pay the carriers, they counted that freight and baggage, to a total of 150 times the number of passengers in the organization to which the goods appertained, was exempt from the carriage charges.

On this appeal a single question is to be decided, viz: whether appellant (claimant in the Court of Claims) is the effectual owner of claims which formerly belonged to another corporation, the Florida Central & Peninsular Railroad Company. Services were performed by the latter company for the Government in the years 1897 to 1903. In the summer of 1903, by proceedings had in conformance with the laws of the States of Georgia and Florida, where both corporations had been chartered, that company was merged into appellant.

Some twelve years had been spent in preparing this case for trial—mainly to supply the loss of records stored in a Florida Central & Peninsular depot which was destroyed by fire and to overcome obstructions interposed at the Treasury Department—and preparing briefs on the merits of the case. Then, at the hearing, Government counsel raised the question that this merger amounted to a voluntary assignment of the Florida Central & Peninsular assets and so, by reason of Section 3477 of the Revised Statutes, was inoperative to pass title to claims against the United States. The court made findings of fact adverse to claimant both on this question and on the merits of the case and dis-

missed the petition. In an opinion filed it was shown that the case was regarded as not proved on certain material points because the court gave no consideration to a stipulation of counsel which had been treated in the briefs on both sides as part of the case. At the hearing Assistant Attorney-General Huston Thompson had taken charge of the defense. He said that he didn't regard himself as personally bound by the stipulation here referred to nor by the decisions of the court in the cases previously brought to judgment, fifteen in number; that he had no knowledge of his own regarding the facts stated in the stipulation (which was signed by one of his predecessors) and had not examined the testimony on which it was supposed to be based; and that the prior decisions, all except one, had been rendered before he succeeded to the office and he did not know whether the issues decided were precisely those which this case presented. No motion was made, however, to strike the stipulation and the court took no account of the Assistant Attorney-General's observation until it came to decide the case.

Claimant, moving for a new trial, pointed out the injury it had suffered by the cancellation, after submission, of this stipulation and other proofs, filed affidavit proof and discussed the propositions of law presented in the opinion. The court then delivered a new opinion reasserting, as a sole ground for dismissing the petition, the "voluntary assignment" to claimant but leaving the findings of fact, conclusion of law and judgment to stand as they were. Having treated of this question of parties *in extenso*, the opinion, at its conclusion, conceded that if the case was to be decided on its merits it would be proper to give claimant an opportunity for making additional proof; "but," it said, "we are met by the fact that in our opinion plaintiff can not maintain

the action because of Section 3477 above discussed." Then Section 165 of the Judicial Code was quoted and this was added:

> "Holding to the view we do upon the right of the plaintiff to maintain the action we do not feel justified in putting the parties to the expense of taking additional testimony which can not affect the result."

Before taking its appeal claimant filed a motion asking that the parts of the findings which related to the merits of the case be eliminated. This motion was overruled by the court. Incorporated in the application for appeal was a motion for omission from the transcript of the findings relating to the merits. This also was denied; so except for the opinion the case comes to this court on precisely the same record that would have been sent up if there had been a decision unfavorable to claimant both on the question of its standing in court and on the merits of the claim.

The other proofs against which the court closed the door in the same startling way—*i. e.*, by action of its own, unmoved in any way by defendant's counsel, taken after the submission—had been drawn formally, in the way prescribed by the rules and practices of the court, from the files of those suits of other railroad companies, on the same subject, which the court had decided during some seven years preceding.

In all of those fifteen antecedent cases the judgments had been for the claimants; and much of the evidence on which those judgments were rendered was of the same pertinence to the present cases as to the cases of which it was entitled. Moreover, in divers of those cases the particular defenses which offered in the present case (including even the question of a corporation's

acquisition of a claim by the process of a merger) had been urged and been overruled by the court. Counsel for claimant believed, and now believe that *stare decisis* would have a sufficient rejoinder, if no other had existed, both to the general traverse and to these special defenses.

Upon filing here the appeal record claimant moved for excision therefrom of the particular findings of the Court of Claims which go to the merits of the case. With that motion there were printed as exhibits six certified extracts from Court of Claims records beside a brief. The facts stated above, where not included in the record proper (which, not having been printed at that time, is referred to in the motion as "typewritten record") will be found in those transcripts. That motion, by order of the court, stands for hearing with the appeal proper.

ASSIGNMENT OF ERROR.

Error is assigned, committed by the Court of Claims, as below:

(1) In entertaining, after general traverse filed, proof made and trial commenced, an objection to claimant's capacity to maintain the suit.

(2) In holding that the merger of the Florida Central & Peninsular Railroad Company into the claimant corporation was a voluntary assignment of the former's choses in action.

(3) In not holding that the claimant corporation is the owner of all the choses in action formerly held by the Florida Central & Peninsular Railroad Company and competent to prosecute any claims against the United States that had accrued to that company.

(4) In not holding that the question of the claimant corporation's right to maintain suit on the claims pleaded was affirmatively settled by the previous de-

cisions of the Court of Claims itself relative to mergers such as was shown in this case.

(5) In not holding that the whole question of claimant's right to have a judgment against the United States as prayed was affirmatively settled by previous decisions of the Court of Claims itself in like cases.

(6) In holding that full proof of the right of action set up in the petition would be futile, by reason of Section 165 of the Judicial Code, and denying, therefore, to claimant the right to make such proof.

(7) In holding that Section 165 of the Judicial Code forbade the making of proof by claimant to supply omissions caused by the court's cancellation *ex mero motu* of proofs on which the case was submitted and to remedy assumptions, indulged by the court, to claimant's injury, notwithstanding that the burden was on the defendant to establish the matters so assumed.

PROPOSITIONS OF LAW.

Section 3477 of the Revised Statutes is merely for the protection of the Government. It seeks to prevent the acquiring by strangers of speculative interests in claims, such as may naturally inspire efforts for their collection, and the imperilling of the Government's rights through the need of dealing with several persons instead of one.

Spofford v. *Kirk*, 97 U. S. 484.
Goodman v. *Niblack*, 102 U. S. 556.
Bailey v. *United States*, 109 U. S. 432.
Price v. *Forrest*, 173 U. S. 410.

Section 3477 does not apply to any transaction or fortuity by which the existence, natural or legal, of one person or legal entity is terminated and another suc-

ceeds to its rights, nor to any transfer of a claim by operation of law. Inheritance of a decedent's estate, an assignment for the benefit of creditors, or other insolvency proceedings, bankruptcy, whether involuntary or voluntary, a receivership or a bequest in a will is as effectual to transfer a claim against the United States as any other claim.

Erwin v. *United States*, 97 U. S. 392.
Butler v. *Goreley*, 146 U. S. 303.
Goodman v. *Niblack*, *sup.*
Price v. *Forrest*, *sup.*

A question regarding the form of a suit or the parties thereto is subject to the general rules governing pleas in abatement. It must be raised before an issue is framed as to the merits of the suit; otherwise it is waived.

Lanier v. *Trigg*, 6 Sm. & M. (Miss.) 641.
Commercial Bank v. *Thompson*, 7 Sm. & M. 443.
Mills, et al, v. *Extrs. of Bland*, 76 Ill. 381.
Bailey v. *Dozier*, 6 How. 23 (30).
Holdridge v. *Holdridge's Estate*, 53 Vt. 546.
Watts, Trustee, v. *Sweeney*, 127 Ind. 116.
Chamberlayne v. *Nazro*, 188 Mass. 454.
Baker v. *Union Stock Yards Nat. Bank*, 63 Nebr. 801.
Union Type Foundry Co. v. *Kittaning Ins. Co.* 138 Pa. St. 137.
Morgan v. *First Natl. Bank*, 93 N. C. 352.

Statutes abolishing special pleading or authorizing "brief statement" of the issues do not change the order of pleading fixed by the common law so as to permit

pleading in abatement after or in conjunction with pleas in bar of the action.

Clark v. *Oregon Short Line R. R. Co.* 29 Mont. 319.

Kenyon v. *Williams*, 19 Ind. 44 (47).

Stewart v. *Smith*, 98 Me. 104.

Though a statute and a rule of a federal court require that, if it appears to the satisfaction of the court at any time that the controversy is not within its jurisdiction, the suit shall not be permitted to proceed further, they do not give either party a right, without proper pleading, at the proper time, to offer proof and make out a case calling for such dismissal.

Hartog v. *Memory*, 116 U. S. 588.

If the rule of the court permits simultaneous pleading of matter in abatement and matter in bar, a plea to the merits alone is nevertheless a waiver of matter in abatement.

Hewitt v. *Story*, 39 Fed. 158 (160).

ARGUMENT.

Nothing will be said here except upon the question which the Court of Claims, in its opinion, says it has decided, viz: the capacity of appellant to maintain the action. In regard to the other matter which appellant has felt itself compelled to bring up for correction by this court, viz: the irrelevancy and impropriety of findings of fact going to the merits of the suit, reliance will be on the brief which accompanied the motion made in that behalf.

Section 3477 of the Revised Statutes, even though seasonably invoked, could have no pertinence to the suit.

In *Erwin* v. *United States*, 97 U. S. 392, and later cases this court has decided that when, in the very act

or event by which choses in action are transmitted the original holder is extinguished as a legal entity, Section 3477 of the Revised Statutes does not apply. That is the present case precisely. The Florida Central & Peninsular Railroad company from the moment of the merger into the Seaboard company ceased to exist. Its stock was cancelled by a substitution of Seaboard shares. No pretense of an organization was maintained thereafter. The company disappeared from the railway manuals except for the inclusion of its bonds, under the Seaboard caption, among the Seaboard liabilities. There was no power left except the Seaboard company to prosecute any claim against any debtor.

It is submitted that, to say a claim perishes when its owner dies or surrenders to others his entire estate and his place in the business world, would be to misread radically *Erwin's* case, *sup*, *Butler* v. *Goreley*, 146 U. S. 303, and *Goodman* v. *Niblack*, 102 U. S. 556.

If no thought be taken of the status or rather the non-existence of the Florida Central & Peninsular company, after its merger, it still will be obvious that this merger, like the inheritance by children of their father's choses in action, like bankruptcy or insolvency proceedings, like a receivership, is an "operation of law." Not one step could be taken effectually to put the Seaboard company in the shoes of the other company unless it were the step prescribed, and the method pursued were the method prescribed, by the State laws to which the two corporations owed their existence. Surely a corporation merger is the work of the law in a stricter sense than is an inheritance from an intestate ancestor or a bequest in a will.

Having pleaded to the merits of the case and then, during some thirteen years having participated in the preparation of the case, and finally having gone to trial on that issue, the defendant had forfeited all right to make objection to the party plaintiff.

The decisions of this court and of all others in this country, except where a local statute has created an exception, are very clear to the point that, if a defendant wishes to avail of something not going to the merits of the claim sued on, he must do so before pleading to the merits, or at least before going to trial upon the merits. Various illustrations of this rule are afforded by the cases cited above (pp. 7 and 8), and it hardly seems necessary to amplify the proposition stated. The application of a few among those cases, however, may well be explained.

In *Lanier* v. *Trigg*, 6 Sm. & M. (Miss.) 641, the suit was upon a promissory note, and the plaintiff was, and described himself as being, assignee of the payee. Having joined issue on the merits of the suit, the defendant sought at the trial to plead and prove that the assignment was of a kind invalidated by law. It was held that such a plea did not lie after the controversy had been framed on the merits of the suit. To the same effect is *Commercial Bank* v. *Thompson*, 7 Sm. & M. (Miss.) 443.

A somewhat remarkable case is *Mills, et al.* v. *Executors of Bland*, 76 Ill. 381. The suit there had been brought in the name of Mrs. Bland. The attorneys who had instituted the proceeding suggested later the death of Mrs. Bland, had her executors substituted as plaintiffs and filed an amended declaration. To that the defendants pleaded in bar. At the trial the defend-

ants sought and were denied leave to show that Mrs. Bland in fact had died before the suit was commenced. The appellate court concurred in the view that every issue, except relating to the merits of the claim, was closed when the trial opened, and affirmed the judgment.

In the instant case the original petition was filed in April, 1904. No demurrer or special plea being interposed, an issue was made up, upon the merits of the case alone, sixty days thereafter (Opinion, record, p. 23). The Government joined in the various and vexing labors required to prepare the case for trial, and then went to trial in February, 1917, on the merits. At this stage—twelve years after the time when a suit by any other claimant than the Seaboard Air Line Railway would have been barred—Government counsel interposed the objection that the right of action was not in this company. If there were a discretion in the Court of Claims to entertain a dilatory plea after issue joined on the merits (which we say there was not) it would have been an abuse of discretion to entertain it after the doors of the court were closed to the other party whom the defendant was bound to point out (by way of tendering a better writ) as the proper claimant.

The Court of Claims, while not denying that there is a fixed order for the pleadings which it will receive, cites *Labadie's* case, 31 Ct. Cls. 436, as authority for allowing special pleading, at the court's discretion, after the lapse of the sixty days fixed for demurrer, plea or answer. In that case, however, the belated plea, so-called, which the court received was truly a counter-claim; it related strictly to the merits of the plaintiff's claim, because it undertook to apply, against a judgment to be rendered thereon, a claim of the Government against the plaintiff. The decision, therefore, is not a warrant for entertaining

a plea in abatement after or upon trial of the merits of the plaintiff's claim.

If Labadie had not been the true party in interest but merely posed as such, and the Government nevertheless had filed a plea of the general issue, and no more, and, after proof made to establish the right of action pleaded, had for the first time attempted to plead the absence of the proper party plaintiff, it is not to be imagined that the Court of Claims would have indulged it so to do.

In *Butler* v. *Goreley*, 143 U. S. 301, the assignment made by the owner of the claim was clearly of the sort to which Section 3477 applied, but the owner, so far from repudiating it, had stood by while the assignee made collection at the Treasury. The owner, bringing suit against the assignee for the money, was held to be concluded by his acts. If negative and informal action—mere sufferance by an outsider of a suit—is conclusive, can the defendant in the suit itself avoid an assignment after he has joined in a trial upon the merits of the claim?

To comply with Section 159 of the Judicial Code, to which the opinion of the Court of Claims refers as contributing to frame issues, the petition averred that "no part of the claim sued on had been paid" and that "its claim" (petitioner's) thereto had not been assigned. Here, according to the usual practice of the Court of Claims, Section 159 was applied as requiring merely a negation of any alienation by the petitioner itself of the claim stated—as having no relation whatever to the method by which the petitioner had acquired the claim. This, however, does not seem to be material. It is often necessary to plead, in connection with a statement of the injury done, or debt due by the defendant, matters going to the jurisdiction of the court over the parties or to the personal capacity of the plaintiff to prosecute

the claim; but issues on such points are matters of abatement, and must be raised in advance of a contest upon the cause of action itself. In the three cases last discussed above and in others of those cited at pp. 7 and 8, *sup.*, the juridisdictional facts, or the facts which connected the plaintiffs with the causes of action, were pleaded in the petitions, but it did not follow that the defendants might forbear raising issues touching those facts until after issue had been made upon their pleas in bar of the actions.

The Court of Claims in its opinion says that "the plaintiff relies upon the familiar rule that at common law a plea in bar is a waiver of matter which should be pleaded in abatement." Appellant's counsel did contend for that rule both at the hearing and in their motion to set the judgment aside, and they contend for it here as being not less applicable, in law and in morals, to the United States and to the Court of Claims than to other litigants and other courts.

The opinion of the Court of Claims also (p. 24) invokes Section 165 of the Judicial Code, as follows:

> "When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein."

The similarity of this provision to the act of 1875 construed in *Hartog* v. *Memory*, 116 U.S. 588, applying to other federal courts will be obvious. Undoubtedly it was intended to serve the same office in the Court of Claims which that enactment performs in the other courts; and this means that, while the court will not consciously waste its time upon matters which it can not effectually decide, it must not permit the defendant, out of season, to raise objection to the entertainment of a claim which, if proved, entitles the claimant to a judgment.

What the present claimant pleaded (Rec. p. 1) was that it "owns and operates other railroads which at those times belonged to other corporations which have since been merged into it and to whose rights, in the matters hereinafter stated, it has therefore succeeded" and that "one of said corporations was the Florida Central & Peninsular Railroad Company." The Government's objection, assigned at the hearing (Rec. p. 18) was that the merger referred to, in the case of the Florida Central & Peninsular company, was of such sort as to be obnoxious to Section 3477 of the Revised Statutes, and in relation to this proof was then made for the first time. It is respectfully submitted that the right to make any such defense was waived by pleading the general issue, upon the merits of the claim, or by proceeding during long years to make proof upon the merits alone, or at least by entering upon the trial without any pleading or any proof except upon the merits.

BENJAMIN CARTER,
Attorney for Appellant.

FRANK CARTER POPE,
Of Counsel.

CONTENTS.

	Page.
Statement	1–5
Argument	5–14
I. The claim sued upon is void under section 3477, R. S.	5
II. The objection of the Government was jurisdictional and was not even necessary	11
Appellant's motion for diminution of record or remand to the Court of Claims	14–17
Conclusion	17
Appendix	18–21

AUTHORITIES CITED.

District of Columbia v. *Barnes*, 197 U. S. 146, 154	12
Erwin v. *United States*, 97 U. S. 382	6
Goodman v. *Niblack*, 102 U. S. 556	6
Hancock M. L. I. Co. v. *Worcester N. & R. R. Co.*, 149 Mass. 214	8
Insurance Company v. *Lewis*, 97 U. S. 682	13
Murray v. *Pocatello*, 226 U. S. 318	16
National Bank of Commerce v. *Downie*, 218 U. S. 345, 353	5
Price v. *Forrest*, 173 U. S. 410	6
Railroad Co. v. *Georgia*, 98 U. S. 359, 363	8
Spofford v. *Kirk*, 97 U. S. 484, 488	5
St. Paul & Duluth R. R. Co. v. *United States*, 112 U. S. 733, 736	5
United States v. *Garlinger*, 169 U. S. 316, 322	17
United States v. *Gillis*, 95 U. S. 407, 415	12
University of Vermont &c. v. *Chester Baxter's Estate*, 42 Vt. 99	8

STATUTES.

United States Revised Statutes, section 3477	4–5
United States Judicial Code, section 165	12
Code of Georgia (Appendix)	18–20
Florida Compiled Laws (Appendix)	20–21

In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE SEABOARD AIR LINE RAILWAY, appellant, *v.* THE UNITED STATES. } No. 248.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This action was brought to recover amounts alleged to have been unlawfully deducted, on account of free baggage allowances, from compensation due the Florida Central & Peninsular Railroad Company on certain freight shipments made over its lines by the United States more than four years before the plaintiff corporation was created.

The plaintiff sued as successor to the rights of the Florida Central & Peninsular Railroad Company through a merger or consolidation of that corporation with one of the same name as the plaintiff, less than 10 months prior to the filing of the original petition.

The petition was dismissed on the ground that by this merger or consolidation a voluntary assignment and transfer of the said rights was made to the new

corporation, which assignment was null and void under the provisions of section 3477 of the Revised Statutes, and that therefore no court had jurisdiction to grant the relief prayed for.

The plaintiff appeals from the judgment of dismissal.

During and immediately after the war with Spain, and in the years 1898 and 1899, the Florida Central & Peninsular Railroad Company, a corporation organized and operating under the laws of Florida and Georgia (Finding I. R., p. 4), transported over its lines, either as sole carrier or as final carrier of shipments originating on the lines of the Southern Railway Company, certain freight and baggage accompanying movements of United States troops.

The shipments were all made upon Government bills of lading bearing such notations as "10 cars baggage free allowance of 150 pounds per man for 46 officers, 1,246 enlisted men, and 22 teamsters" (Finding of Fact IV, item 11, Rec. p. 11); "allow 150 pounds each for 101 men, 15,150 free" (item 20, p. 14).

The notation upon each bill of lading was in conformity with the transportation rates agreed upon for that shipment, as shown by a letter of the Chief Quartermaster of the Department of the Gulf (Finding IV), by a resolution of the Southeastern Passenger Association (Finding VII), or by the "tariff rates" (Finding VI).

Settlements were made with the Florida Central & Peninsular Railroad Company, the final carrier, and

were for the full amounts stated in the vouchers that company rendered to the Government. The company, without protest, accepted, retained, and gave its receipt in full for such payments. No claim for unauthorized baggage deductions was made by the Florida Central & Peninsular Railroad Company or by any other person prior to the institution of the present suit, except as to items 1, 2, 3, 4, and 16 (R. pp. 7, 8, 9), for which action was brought at or about the same time by the Southern Railway Company, the initial carrier in those shipments, in which action that claimant recovered judgment. (Finding IV, p. 9.) This suit and that of the Southern Railway Co. were filed in April, 1904, more than five years after the troop movements occurred.

In the meantime and on the 27th day of June, 1903, the Florida Central & Peninsular Railroad Co. and the Seaboard Air Line Railway Co., a corporation organized and existing under the laws of Virginia, North Carolina, South Carolina, Georgia, and Alabama (finding I, R. p. 4), entered into an agreement called "Articles of agreement of merger and consolidation," prescribing the terms and conditions of the merger and consolidation. Article X of that agreement provided that "the rights, privileges, and franchises of each of said constituent companies, and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as

effectually as they were in the former companies" (R. p. 5).

The claimant went to trial upon an amended petition alleging its rights in the claim in suit in these words (par. I, p. 1):

> Petitioner is a corporation organized under the laws of the State of Virginia. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina, and Georgia. It now owns and operates also railroads which at those times belonged to other corporations which have since been merged into it and to whose rights, in the matters hereinafter stated, it has therefore succeeded. One of said corporations was the Florida Central and Peninsular Railroad Company.

A general traverse was entered in behalf of the defendant. (R. p. 3.)

At the first opportunity, or when the facts constituting the merger appeared at the trial, objection was duly made that the plaintiff had no rights in the alleged claim which were capable of enforcement, by reason of the provisions of section 3477 of the Revised Statutes, which is as follows:

> SEC. 3477. All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely

> null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same.

The court, upon the facts as found by it, sustained the objection and dismissed the petition.

ARGUMENT.

I. The claim sued upon is void under Section 3477 R. S.

Section 3477 of the Revised Statutes makes assignments and transfers of claims against the Government, prior to allowance, absolutely null and void. The claim in suit was transferred to the plaintiff by the terms of a voluntary agreement. The claim therefore never accrued to the plaintiff as an actionable right against the United States.

National Bank of Commerce v. *Downie*, 218 U. S. 345, 353.

St. Paul & Duluth R. R. Co. v. *United States*, 112 U. S. 733, 736.

Spofford v. *Kirk*, 97 U. S. 484, 488.

It is true this court has held that a transfer by operation of law does not come within the inhibition of that statute. *Erwin* v. *United States*, 97 U. S. 382; *Goodman* v. *Niblack*, 102 U. S. 556; *Price* v. *Forrest*, 173 U. S. 410; but it is not true that the consolidation of these corporations, as by operation of law, created the plaintiff's title to the alleged claim. On the contrary, the consolidation was itself created by the transfer to the new company of the former company's properties, including this alleged claim. This is manifest from the provisions of the "Articles of agreement of merger and consolidation" set out in Finding of Fact I, pages 4–5. From this agreement it is evident that no judicial or other procedure at law was invoked to bring about the merger; that the law in no way operated in the matter further than to give effect to the agreement as a lawful one between the parties.

The original Seaboard Air Line Railway is not the plaintiff in this action. That company was originally organized under the laws of the State of Virginia, and by duly authorized consolidations or mergers with corporations operating railroads in Virginia, North Carolina, South Carolina, Georgia, and Alabama had become a consolidated corporation under the laws of those States. (Finding of Fact I, p. 4.) That consolidated company was one of the two constituent companies consolidated in a new corporation, the plaintiff in this action. The other constituent corporation was the Florida Central & Peninsular Railroad Co., a corporation duly incorporated and

operated under and by virtue of the laws of the States of Florida and Georgia. (Finding I, p. 4.) The transaction was, therefore, not merely a merger of the Florida Central & Peninsular Railroad Co. with and an absorption of it by an already existing corporation of the same name as this plaintiff, with the effect that the Florida company's properties melted into those of an existing corporation which thereby acquired the Florida company's rights *as they existed in that company*, by a process of legal succession, and so by operation of law. There was only a chronological and contractual succession, and this was by the voluntary act of the parties. The claim sued upon was transferred by the voluntary action of its owner. It was not acquired by operation of law. The law permitted the transfer, but it did not initiate it, prescribe any of the terms or conditions on which it was made, or have any operative effect upon the transaction. It is a transfer of this kind that is within the inhibition of section 3477 as construed by this court.

The plaintiff corporation came into being as a new and distinct entity by force of the substitution of its capital stock for and in the place of the capital stock of the constituent companies, which was converted into that of the consolidated company in the manner provided for in the agreement of merger and consolidation. (Finding of Fact I, p. 5.) That agreement was made under the authority of the statutes of the States of Georgia and Florida. (Finding of Fact I, p. 6), which statutes did not prescribe its

terms. (These statutes are printed as an appendix to this brief, p. 18.)

The statutes themselves did not effect a merger, but rather they authorized an agreement of consolidation which had the effect of creating a new corporation in lieu and in place of the former corporations, as in *Railroad Co.* v. *Georgia*, 98 U. S. 359, 363.

"It is usual," said the court in *John Hancock M. L. I. Co.* v. *Worcester N. & R. R. Co.*, 149 Mass. 214, "for consolidating statutes to introduce more or less of the element of succession or continuity of legal person as to existing rights and duties, notwithstanding that in other respects the old and new corporations are not the same. It is for the legislature to say how far the new corporation shall be, as it were, the heir, executor or continuer of the old." In *University of Vermont and State Agricultural College* v. *Chester Baxter's Estate*, 42 Vt. 99, notes were executed to the University of Vermont; that corporation and another were united under the plaintiff's name, and as such brought suit on the notes. The statutes declared that upon the organization of the new corporation and upon certain votes being had, all the property of each of the former should be vested in it. It was held that the real estate vested in the new corporation by the terms of the statute, and that while the statute was silent as to the personalty, nevertheless the personalty, although without assignment, also vested in the new corporation, and by virtue of the statute the plaintiff was substituted for the original payee and might bring suit as such.

So while the status of the old and new corporations after consolidation is for certain purposes determined by the terms of the statutes and the agreement under which the consolidation is formed, yet even if these statutes and this agreement expressly provided that the particular chose in action in suit should, by force of the consolidation there authorized, be transferred from the Florida Central & Peninsular Railroad Co. to the plaintiff precisely as it existed in the former company, unless the formalities required by section 3477 were complied with the State legislation would have been ineffectual to override the Federal requirements.

The agreement of merger and consolidation provided (Finding of Fact I, p. 5):

> Upon, from, and after the execution of these articles of merger and consolidation, and the ratification thereof by the stockholders of the constituent companies and the filing of the same as required by law, the rights, privileges, and franchises of each of said constituent companies, and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all property, rights of way, and every other interest shall be as effectually the property of the consolidated company as they were of the

> former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities, and dues of said companies shall thenceforth attach to the consolidated company and be enforceable against it to the same extent as if said debts, liabilities, and dues had been incurred by it.

The claim in suit was one of the items of the property transferred by this agreement. The agreement amounted to no more than any other agreement whereby title to choses in action is transferred, and but for section 3477 of the Revised Statutes it would have operated effectually to give the plaintiff a right to maintain this action. But the claim in suit was in the hands of the Florida Central & Peninsular Railroad Co. burdened with a potential infirmity, imposed upon it by section 3477, which makes the transfer of such claim "absolutely null and void" unless it is freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Moreover, that section requires that "such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained

the transfer, assignment, or warrant of attorney to the person acknowledging the same."

The transfer was not by operation of law and was not made in the manner and with the preliminary formalities required by the statute; the potential infirmities with which the alleged claim was burdened in the hands of the Florida Central & Peninsular Railroad Co. became actual infirmities when the transfer was made, destroying the life of the claim as an enforceable chose in action in the hands of the plaintiff.

II. The objection of the Government was jurisdictional and was not even necessary.

The defendant's objection to the plaintiff's right to maintain the action was timely, though unnecessary. The objection was not merely to claimant's capacity to maintain the suit, but rather to the jurisdiction in the broadest sense. The objection could not have been made specifically to the petition, for the petition states no cause of action; and, until proof was offered, there was not only no allegation as to how and when plaintiff acquired the claim, but no allegation as to how the claim accrued or as to what railroad performed the services upon which it was based. It was incumbent upon plaintiff to prove that a valid claim existed and that it owned the claim. Nothing but a confession of judgment can waive this proof. Where, as in this case, there is an entire failure of subject matter to which the jurisdiction of any court can attach, it is the clear duty of the court to take notice of that fact of its own motion.

Section 165 of the Judicial Code provides:

> When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.

This provision is mandatory upon the Court of Claims. When it appeared on the record in the court below that the merger by which the plaintiff acquired its title to the claim was worked by voluntary agreement in the nature of a purchase and sale, it became obvious that the transfer was within the inhibition of section 3477 and that the plaintiff could not recover upon the claim in any court. Clearly, further proof of the merits of the cause of action could not thereafter have aided the plaintiff in any way. Section 3477 of the Revised Statutes "is made to operate directly on the claims themselves, and not as limitations on, or definitions of, the powers of those who are to adjust them or adjudicate upon them. (*U. S.* v. *Gillis*, 95 U. S. 407, 415.)

The Court of Claims is not bound by special rules of pleading. (*District of Columbia* v. *Barnes*, 197 U. S. 146, 154.) Assuming that the averments of the petition, amounting only to a conclusion of law, without any statement of essential facts, purported to show the claimant's right to recover for alleged underpayment to the Florida Central & Peninsular Railroad Co., these averments were, if sufficient for any purpose, so broad and general in their terms as to admit proof of either a voluntary assignment of the

claim or a transfer by operation of law. This sweeping and comprehensive allegation, wholly lacking as it was in specific recitals of the facts constituting the merger, required only a general traverse to raise an issue. For the purpose of impeaching the right of the claimant to collect the amount, if any, due the original owner of the claim, this was equivalent to a plea in bar, not in abatement of the action; for it denied the claimant's right to sue upon the alleged claim not only in the Court of Claims but in any court. It had the effect of putting plaintiff to its proof and its proof failed.

A situation similar to that in this case was before this court in *Insurance Company* v. *Lewis*, 97 U. S. 682. In the case there under review Lewis, a public administrator, had assumed authority to bring an action as such against the insurance company upon a policy of insurance. It was established at the trial that Lewis had no such authority. Judgment, however, was rendered in his favor but was reversed by this court. The following language taken from the opinion of Mr. Justice Harlan is directly applicable here:

> But it is further contended that the answer, which relied upon these objections to the action, was in the nature of a plea in abatement, and that such objections were, according to establish rules of practice in the Federal courts, waived when the company answered to the merits without first having the court dispose of the issue as to Lewis's right to maintain the action. This position is, however,

> wholly untenable. The defense, so far as it impeached the authority of Lewis, by virtue of his appointment as public administrator, to collect the amount, if any, due on the policy, was in bar, not in abatement, of the action. The defense, if true, did not question his capacity as such administrator to perform any of the duties imposed upon him by law. It only insisted that he, as such lawfully appointed administrator, had no cause of action against the company upon the alleged contract of insurance.
>
> What we have said is decisive of the case, and we are consequently relieved from the necessity of inquiring whether the policy sued on was ever delivered to or accepted by Berton, so as to be binding upon the insurance company. That question can only arise in an action against the company by one who is entitled by law to represent his estate.

In that case the claim against the Insurance Company was null and void in the hands of Lewis as public administrator for purposes of enforcing it in any court of law; for he was not authorized in that capacity to bring any action upon it. Similarly in this case the claim in suit is null and void in the hands of the Seaboard Air Line Railway as assignee, by reason of the positive inhibition contained in Section 3477.

APPELLANT'S MOTION FOR DIMINUTION OF RECORD OR REMAND TO THE COURT OF CLAIMS.

The second group of cases cited on page 34 of the appellant's brief on this motion to support the proposition that an affirmance of this judgment will

determine all questions in defendant's favor, in fact go no further than to hold that when constitutional questions are involved in a general judgment or decree on the merits the appeal to this court brings the whole case here. Those cases do not hold that the same rule applies where appeals from such judgments involve merely jurisdictional questions; and this for the reason that while this court will always review constitutional questions and properly to do so must have the entire record before it, the same considerations do not apply to questions purely jurisdictional.

If this court decides that the appellant is barred by Section 3477 from maintaining an action upon this claim, the appellant will in no way be prejudiced by the findings of fact on the merits, and could not be helped by the granting of permission to supplement the proof made by it in the court below.

It was conceded by the court below (Op. R., p. 24) that the proper withdrawal at the trial by the Assistant Attorney General of a certain stipulation upon which previous cases had been tried, and upon which up to that time the plaintiff had relied, might be a ground of surprise which would authorize a continuance in order that the proof theretofore considered as covered by the stipulation might be made; but the court was at that juncture confronted by the fact that the plaintiff could not in any event maintain the action, regardless of proof on the merits, because of section 3477 of the Revised Statutes. The trial court denied this relief to the plaintiff only because that

section required such a ruling under section 165 of the Judicial Code, hereinbefore quoted.

Furthermore, the ruling of the trial court had the effect of construing as a demurrer the defendant's objection to the plaintiff's right to maintain the action.

A court which is not empowered to grant relief whatever the merits may be, can not decide what the merits are, and a judgment sustaining a demurrer to and dismissing the bill on the ground of such lack of power is not *res adjudicata* on the merits.

Murray v. *Pocatello*, 226 U. S. 318.

It would seem that the reason for this motion has been removed by the actual printing and filing of the transcript of record, which contains the findings objected to. They are now before this court for such consideration and application as it deems proper to give them. The court will consider these findings before it or otherwise, as it seems proper.

The Government is entitled as a matter of right to have the findings stand as found, not only because they tend to strengthen the defendant's contention on the question of jurisdiction, but particularly in view of the fact that Findings III–VII bear directly upon the effect of the settlements made with the Florida Central & Peninsular Railroad Company for the full sums stated in the vouchers, which sums that company, without protest, accepted and retained, and for which it gave receipts in full. (Finding III.) Such a course of conduct, coupled with a subsequent

assignment of a claim the subject matter of which was covered by such payments, in itself is sufficient to brand the claim in the hands of whomsoever it may be with the infirmity wrought by the principle of well-settled cases, that the receipt of payment, purporting to be in full, where there is no fraud or coercion, can not afterwards be repudiated as insufficient.

United States v. *Garlinger*, 169 U. S. 316, 322.

As bearing upon these points the Government is entitled to have the record of the trial before this court precisely as it stood at the time the court below concluded that upon that record the plaintiff could not maintain the action as a matter of law.

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Claims should be affirmed.

Respectfully submitted,

FRANK DAVIS, Jr.,
Assistant Attorney General.
CROWLEY WENTWORTH,
Special Assistant to the Attorney General.

MARCH, 1920.

APPENDIX.

Code of Georgia (1895), sections 2173 and 2179; Code 1914, sections 2591 and 2597 (acts 1892, pp. 49 and 51):

> Contracts to connect, merge, or consolidate with or purchase, etc., other companies: Said railroad company shall have the power to make contracts with any railroad company which has constructed or shall hereafter construct any railroad within this State or any other State, that will enable said company to run their roads in connection with each other, and merge their stocks, or to consolidate with any such company within or without this State, or to lease or purchase the property of any other such company and hold, use, and occupy the same in such manner as they may deem most beneficial to their interest: *Provided*, That no railroad shall purchase a competing line of railroad or enter into any contract with a competing line of railroad calculated to defeat or lessen competition in this State; and any violation of this section shall subject the corporation to all the penalties incident to such violation of the law.
>
> Sale, etc., to, or consolidation with, other companies: Any railroad company incorporated under the provisions of this Article shall have authority to sell, lease, assign, or transfer

its stock, property, and franchises to, or to consolidate the same with, those of any other railroad company incorporated under the laws of this or any other State or of the United States, whose railroad within or without this State shall connect with or form a continuous line with the railroad of the company incorporated under this law, upon such terms as may be agreed upon; and conversely any such corporation organized under the provisions of this Article may purchase, lease, consolidate with, absorb, and merge into itself the stock, property, and franchises of any other railroad company incorporated under the laws of this or any other State or the United States, whose railroad within or without this State shall connect with or form a continuous line or system with the railroad of such company incorporated under this law, upon such terms as may be agreed upon. And it shall be lawful for any railroad company or corporation now or hereafter formed by the consolidation of one or more railroad companies, or corporations, organized under the laws of this State, and any other States, with one or more companies or corporations organized under the laws of any other State, or under the laws of this and other States, to issue its bonds and stock as provided for in this Article, in such amounts as they may deem necessary for the purpose of paying or exchanging the same for or retiring any bonds or stocks theretofore issued by either of the said companies, or corporations, so merged, purchased, or consolidated, or for any other purpose, and to the

amount authorized by the laws of the State under which either of said companies, or corporations, so consolidated was organized, and to secure the same, in case of bonds, by mortgages or trust deeds upon its real or personal property, franchises, rights, and privileges, whether within or without this State: *Provided*, That no railroad company shall make any contract under the provisions of this section with any other railroad company which is a competing line, that is calculated to defeat or lessen competition in this State or to encourage monopoly.

Florida Compiled Laws, sections 2812 and 2815:

"Consolidation, lease and purchase: Any railroad or canal company in this State shall have the power, and authority is hereby granted, to make and enter into contracts with any railroad or canal company which has constructed or shall hereafter construct any railroad or canal within this State or in another State as will enable said companies to run their roads in connection with each other, and to merge their stock, or to consolidate with any company within or without this State, or to lease and purchase the stock and property of any such company, and hold, use and occupy the same in such manner as they shall deem most beneficial to their interests.

* * * * *

(Ch. 1987, acts 1885, 28; ch. 3745, act 1887, 1; ch. 6230, June 3, 1911, 1, amending 2812, Gen. St.)

Companies incorporated in other States may construct or own lines in this State: Any rail-

road or canal company already or hereafter organized under or by virtue of the laws of any other State or Territory, desiring to extend or construct any part of the whole of its line or lines of railroad or canal in this State shall, upon filing in the office of the Secretary of State a copy of its charter or charters, be entitled to all the powers and privileges, and be subject to all the liabilities enjoyed by and imposed upon domestic companies of the same nature. Whenever a railroad company organized under and by virtue of the laws of another State becomes the owner of a line of road already completed in this State, said railroad company, upon filing in the office of the Secretary of State a copy of its charter or reorganization either before or after the enactment of this provision, shall be entitled to the said powers and privileges and subject to the said liabilities enjoyed by and imposed upon domestic companies of the same nature. (Ch. 3906, acts 1889, sec. 1, amended by ch. 4615, acts 1897, sec. 1.)"

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Supreme Court of the United States.

October Term, 1918.

THE SEABOARD AIR LINE RAILWAY,
Appellant,
v.
THE UNITED STATES,
Appellee.
No. 748.

MOTION OF APPELLANT FOR DIMINUTION OF RECORD OR REMAND TO COURT OF CLAIMS.

Appellant by its attorney shows to the court the following-stated facts:

1. This case relates to the compensation due from the United States for freights transported with divers bodies of troops during and after the war with Spain. The movements in question passed over and terminated on the lines of the Florida Central & Peninsular Railroad Company. That company, before the suit was brought, was merged into the claimant corporation, and the latter sues as its successor in title to all choses in action.

2. Before and during the war with Spain accounting officers of the United States, in making settlement with railroad companies on certain movements of troops, took the ground that, since railroad passengers were entitled to free carriage of personal baggage to the amount of 150 pounds per capita, the Government, when army impedimenta or supplies were

carried with troops, was relieved of freight charges on those to the amount which, with the personal baggage carried, made up an aggregate of 150 pounds per man. The Second Comptroller or the Comptroller of the Treasury, upon appeals, three times disapproved this ruling and awarded the railroad companies compensation for the carriage of the freights concerned. The Comptroller in the latest of these decisions, which was rendered on October 30, 1901, and in which the two decisions of the Second Comptroller were quoted (8 Compt. 264) said that when personal baggage and impedimenta had been placed together in the same cars the free baggage allowance should be made by determining the average weight of the personal baggage carried for each person and multiplying it by the number of persons carried. In the movements here concerned the railroad companies furnished separate cars for personal baggage, but into those cars and into freight cars the Government's officers loaded army impedimenta and supplies and other Government property along with such personal baggage as the enlisted men did not keep with them in the passenger cars. The baggage was not weighed nor estimated separately. When the bills were computed and paid deduction was made at the flat rate of 150 pounds per man from the entire weights hauled. The compensation so denied, to the extent that it dealt with freights, is the subject of this suit.

3. Suits on the same cause of action have been prosecuted in the Court of Claims by fifteen railroad companies beside the present claimant and were brought to judgment in the years 1906 to 1916. The decisions in all these cases were in the claimants' favor.

4. In four of said other cases there was presented

and argued the defense that the term "baggage" included tents and other paraphernalia of troops. In four of said cases there was presented and argued the defense that notations written upon bills of lading by the Government's officers for "free allowance" or "deductions" of 150 pounds per man constituted contracts for the free carriage of freights as well as baggage to said amount. In three of said cases there was presented and argued the defense that, under admonitions from disbursing officers of the Government that they would not pay for any larger amounts of freights, the claimant company had prepared and presented to such officers bills carrying those identical diminutions of weights against which the suits complained. In six of said cases there was presented and argued the defense that the claimant company had, without protest, accepted payment for such diminished amounts of freight. Each of said defenses was made both by briefs and by oral argument. On each of said questions, in every case, the decision of the Court of Claims was in favor of the claimant.

5. There were presented and argued in the present case all of said defenses except only the presentation of bills for diminished weights of freights, and, with respect to the greater part of said movements no defense was made in this case, touching on the merits of the claim, which had not been made in said other cases.

6. On the 9th day of April, 1917, a decision was made by the Court of Claims to the effect (*a*) that said merger of the Florida Central & Peninsular Railroad Company with the claimant corporation was a voluntary assignment of choses in action to which Section 3477 of the Revised Statutes was pertinent, and therefore it did not give the claimant corporation

any power to prosecute the suit, and (*b*) that there was no right of recovery for any claimant whomsoever. Findings of fact and a conclusion of law on both of the issues so determined, and an opinion, were filed.

7. Upon a motion for a new trial and amendment of findings of fact the Court of Claims on January 7, 1918, filed the new opinion which is set out in the record. Except in its concluding paragraphs, said opinion treats of the one issue of the claimant corporation's capacity to maintain the action. Referring to that question the opinion, in the closing paragraph, says:

> "The conclusions reached upon the question discussed necessarily determines the right of this plaintiff to maintain this action and requires an adverse judgment.
>
> "In our former opinion in this case while announcing the views above suggested as to the right of the plaintiff to maintain the action we went further and discussed the case as presented by the findings of fact. We called attention to the fact that a stipulation which had been made in a number of cases similar to the one at bar (except the question of assignment), and upon which the other cases had been tried, had been withdrawn by the Assistant Attorney General in this case, who declined to be bound by it. We recognized the rule stated by Judge Howry in the case of *Jones & Laughlin* v. *United States*, 42 Ct. Cls. 178, but we also called attention to the fact that the plaintiff had not asked a continuance of the case when the stipulation was withdrawn. That the withdrawal of the stipulation upon which, up to that time, the plaintiff had relied might be a ground of surprise, which would authorize a continuance in order to enable the parties to supply by proof what they thought was proved by the stipulation, we have no doubt. Plaintiff now by a motion for a rehearing asks leave of the

court to supply the requisite proof. Some proof has been taken in other cases of a similar kind to this but that proof was not brought into this case nor was it considered by the court in the original hearing. Some affidavits are filed with plaintiff's motion for a rehearing, some of which are to the effect that the settlements which were made and which the plaintiff seeks to question, were made by the accounting officers taking the bills of lading with the notations thereon and treating them as accurate exponents of the facts instead of taking the bills presented by the railroad companies themselves. Though the suit was brought in April, 1904, and was not presented to this court for decision until March, 1917, nearly 13 years, we might afford the plaintiff an opportunity of taking additional proof because largely of the surprise to which it was probably put by the withdrawal of said stipulation which affected some but not all of the questions involved in the case. But we are met by the fact that in our opinion plaintiff can not maintain the action because of Section 3477 above discussed. And Section 165 of the Judicial Code provides: 'When it appears to the court in any case that the facts set forth in the petition of the claimant do not furnish any ground for relief, it shall not authorize the taking of any testimony therein.' Holding to the view we do upon the right of the plaintiff to maintain the action we do not feel justified in putting the parties to the expense of taking additional testimony which can not affect the result.

"The finding of fact show the case as it was presented on the former hearing, and our former opinion in the case will be withdrawn and this opinion substituted therefor.

"For the reasons stated the motion for a rehearing will be overruled."

(Typewritten record, p. 25.)

The court's conclusion of law, following its findings of fact, was as follows:

"Upon the facts found the court concludes as a matter of law that the plaintiff is not entitled to recover and that its petition ought to be and it is dismissed."

(Typewritten record, p. 20.)

8. Following is the text of the court's judgment:

"At a Court of Claims held in the city of Washington on the seventh day of January, A. D., 1918, judgment was ordered to be entered as follows:

"The court, upon due consideration of the premises find in favor of the defendants, and do order, adjudge, and decree that the Seaboard Air Line Railway, as aforesaid, shall not have and recover any sum in this action of and from the defendants, the United States; and that claimant's petition be and it hereby is dismissed."

(Typewritten record, p. 27.)

9. All of the claimant's records and papers pertinent to this claim, with the offices in which they were kept, had been destroyed by fire and no evidence peculiar to this case was submitted on claimant's part except a certified copy of the proceedings by which the Florida, Central & Peninsular Railroad Company was merged into the claimant corporation. Proof of the several movements, and of the deductions, described in the petition, from the compensation therefor was made by reports from the War and Treasury Departments, filed on the part of the Government. In the first of said other cases which was brought to trial, viz., that of the Chicago & Northwestern Railway Company, No. 24,893, depositions of a number of quartermaster officers of the army were taken on the claimant's part in reference to the methods pursued by army officers in and after the War with Spain

in the loading of baggage and freights moved with troops and to the average quantity of baggage mixed with freights in baggage or freight cars, which testimony did not relate especially to the transactions which were the subjects of suit in that case, but to such movements generally, occurring during the time stated, on all railroad lines. On the basis of that evidence a stipulation of counsel was signed fixing the average quantity of baggage per passenger which, in computing the amounts of compensation at issue, should be subtracted from said total weights of 150 pounds per man for which compensation had been withheld. No proof was made for the Government on that subject in said case, nor in any others of said previous cases, and none was made in the present case. In all of said previous cases, following said case No. 24,893 said stipulation, filed in that case, was treated as a part of the record and was copied by the court into its findings of fact. The customs and other terms under which the shipments of the present case were made, and all other elements of the case as so established, were identical, except as to names, dates, places and like details, with those which had been considered and adjudicated by the court in said former cases.

10. Before or at the hearing, by motions and the filing of extracts, all in accordance with the rules and practice of the Court of Claims, there were brought into the present case much evidence that had been submitted in said former cases relating to the particular defenses hereinbefore narrated. Among such evidence were the identical depositions which had been the basis of said stipulation in the case of the Chicago & Northwestern Railway Company (See certificate, Exhibit A, hereto).

11. In a brief filed on behalf of the claimant said stipulation described in paragraph 9 hereinbefore was referred to and was copied. A brief was filed by the Attorney for the United States having the defense of the case immediately in charge, in which the interpretation to be put on said stipulation was discussed and no objection was made to the competence and pertinence of the stipulation to this case. At the hearing the Assistant Attorney General, who had taken charge of the defense, objected orally to said stipulation and moved its exclusion from the record. Counsel for the claimant pointed out why, in his judgment, the objection was not valid. The court made no ruling on said motion, and claimant's counsel received no intimation until said first decision of the case was announced that the court treated the stipulation as stricken from the record; and so no opportunity was afforded claimant to ask for a continuance in order to supplement its proof (See extract from brief, Exhibit B, herein).

12. The hearing commenced on February 20, 1917. Said Assistant Attorney General then stated his belief that the bills which had been filed by said Florida Central & Peninsular Railroad Company in reference to the freight movements which are the subject of the suit were at those same diminished weights of freight on which payment was made and of which the suit complains. The court then, in order to afford an opportunity to produce such bills, continued the hearing until the 27th day of the same month. At that time, the hearing being resumed, the Assistant Attorney General informed the court that the bills referred to could not be found and that he had no proof that such bills as he had described were filed. In making its decision the first time, as stated in its opinion, the

court assumed that bills of that nature were filed and referred to them as evidence of an understanding on the part of the railroad company, at the time of said movements, that free carriage was due for freights of the amount stated, as well as for the personal baggage transported. In fact the bills of said railroad company were computed and rendered, and compensation claimed, for the full weights of freights carried in all of said movements.

13. At the hearing said Assistant Attorney General commented on said proofs which had been brought into the record from other cases, as narrated in paragraph 10 hereinbefore, and expressed doubts of the competence thereof, and thereupon the court announced that the method by which the proofs had been brought in was proper and that they would be considered as evidence wherever relevant; and thereafter, until said first decision was announced, claimant had no intimation that such proofs would not be considered by the court.

14. In November, 1898, which was subsequent to most of the troop movements with which this case is concerned, the railroad companies of the southeastern part of the United States proposed to the Quartermaster General of the Army (*a*) that camp equipage, and other army paraphernalia which were expected to be carried with the soldiers, to-wit, in passenger trains, could be considered as baggage and (*b*) that certain stipulated rates should be paid for all weights of such matter in excess of 150 pounds per passenger. On the Government's part there was no acceptance of said proposition. Said special rates were much higher than the rates applying to such matter as freights; and if said tender had been applied to the movements proved in this case the railroad company's compensa-

tion, computed upon the net weights so established, would in each case have been more than actually was paid to it. The Court of Claims set out said tender in the findings of fact (typewritten record, p. 20), but did not state that same was not accepted; and, though in its first opinion it referred to the same as indicating the meaning of the term "baggage," it did not revise the payments which had been made with respect to the excess weights so as to state the increase of compensation which would be due upon the application of said tender in its entirety.

15. In support of its said motion for a new trial claimant filed in the Court of Claims the affidavits referred to in the second opinion of the court. Some of said affidavits related to the character of the bills filed by the Florida Central & Peninsular Railroad Company and to the method by which vouchers were prepared, on which payment was made by a disbursing officer of the Government. A copy of one of those affidavits is appended hereto as Exhibit C.

16. Following said second decision of the Court of Claims claimant filed two successive motions, with briefs thereon, to strike out of the findings of fact all but the first paragraph. Both of said motions were overruled by the court. Thereafter, when applying for appeal to this court, claimant filed a motion in the Court of Claims for the omission from the transcript in the appeal of all of the findings of fact except said first paragraph. Said motion was overruled by the court. A copy of the second motion to strike findings from the record and of the motion for omission of findings is appended hereto as Exhibit D.

17. In quoting, with reference to some of the movements concerned, a letter written by one Colonel Lee, purporting to state terms which had been fixed between

Government officers and the railroad companies concerned, the court ignored the agreement itself, though that was in evidence. It is radically different from Colonel Lee's recital concerning it. It stipulates as a precaution, the ordinary free carriage, to-wit, of *baggage*.

Attached hereto as Exhibit E is a copy of paragraphs I and II of the three first sentences in paragraph III of the findings of fact hereinbefore referred to, which were made by the Court of Claims upon the original hearing and retained when a second decision was made.

The premises considered, appellant moves that this court, in the printing of the transcript brought to it from the Court of Claims, will cause to be excepted and omitted the paragraphs in the findings of fact numbered III to VII inclusive; also the conclusion of law which follows the finding of fact. As an alternative, appellant moves that the case be remanded to the Court of Claims with directions to make its findings of fact and conclusion of law anew and to confine them to the question of the capacity of appellant, as successor in title to the Florida Central & Peninsular Railroad Company, to maintain this action.

BENJAMIN CARTER,
Attorney for Appellant.

Exhibit A.

IN THE COURT OF CLAIMS.

SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES.
No. 24,915.

CLAIMANT'S MOTION TO WITHDRAW CERTAIN PAPERS FROM CERTAIN CASES.

Comes now the claimant by its attorney and moves the court for permission to withdraw from the files of the court, temporarily, for use in the trial of the above entitled case, so far as the same may be competent, relevant and material, the following papers:

Chicago & Northwestern Ry. Co. *v.* U. S., No. 24,893.
- Findings of Fact and Conclusion of Law. Filed June 11, 1906.
- Deposition of Richard D. Simms. Filed February 8, 1905.
- Deposition of A. D. Bright. Filed February 8, 1905.
- Deposition of Ferd F. Putnam. Filed February 7, 1905.
- Deposition of William E. Mickle, Jr. Filed February 26, 1905.

Pennsylvania Railroad Co. *v.* U. S., No. 24,897.
- Findings of Fact and Conclusion of Law. Filed June 9, 1910.
- Deposition of Amos H. Stephens. Filed May 25, 1910.

Southern Railway Co. *v.* U. S., No. 24,913A.
- Findings of Fact and Conclusion of Law. Filed February 8, 1909.
- Exhibit A. Filed April 16, 1908.
- Deposition of E. T. Jones. Filed April 16, 1908.

Atlantic Coast Line Co. *v.* U. S., No. 24,914.
- Findings of Fact and Conclusions of Law. Filed May 20, 1909.

Chicago, Milwaukee & St. Paul Ry. Co. *v.* U. S., No. 24,895.
Findings of Fact and Conclusions of Law. Filed April 2, 1906.
Cincinnati, N. O. & Tex. Pac. Ry. Co. *v.* U. S., No. 24,920.
Findings of Fact and Conclusions of Law. Filed March 20, 1908.
Missouri Pacific Ry. Co. *v.* U. S., No. 24,907.
Findings of Fact and Conclusions of Law. Filed February 1, 1915.
Chicago, Rock Island & Pacific Ry. Co. *v.* U. S., No. 27,191.
Brief and Findings of Fact, etc. Filed May 18, 1905.

Allowed in open court.

SAML. A. PUTNAM, *Chief Clerk.*

BENJ. CARTER, *Attorney for Claimant.*

2-8-17.

(Motion filed February 8, 1917.

SECOND MOTION OF CLAIMANT TO WITHDRAW PAPERS FROM OTHER CASES.

Comes now the claimant by its attorney and moves the court for permission to withdraw from the files of the court, temporarily, for use in the trial of this case, so far as same may be competent, relative and material, the following papers in addition to those withdrawn from certain cases in claimant's motion allowed on the 8th day of February, 1917.

In the cases below (1) Findings of Fact and Conclusions of Law and (2) Report of Auditor for the War Department.

Chicago, Rock Island & Pacific Railway Co., No. 24,892.
Chicago & Alton Railroad Co., No. 24,901.
Chicago, Burlington & Quincy Railroad Co., No. 24,904.

Northern Pacific Railroad Co., No. 24,905.
Nashville, Chattanooga & St. Louis Railway, No. 24,918.

In the case of the Pennsylvania Railroad Co., No. 24,897, (1) Deposition of Colin Studds and (2) Report of Auditor for the War Department.

In the case of the Pennsylvania Company, No. 24,898, (1) Report of Auditor for the War Department and (2) Report of the Comptroller of the Treasury, filed on May 17, 1911.

In the case of the Southern Railway Company, No. 24,920, (1) Deposition of E. T. Jones with exhibits thereto and (2) Report of Auditor for the War Department.

In the case of the Louisville & Nashville Railroad Company, No. 24,917, Report of Auditor for the War Department and Exhibits B1 and B2 thereto.

In the cases below, Report of the Auditor for the War Department.

Chicago & Northwestern Railway Co., No. 24,893.
Chicago, Milwaukee & St. Paul Railway Co., No. 24,895.
Atlantic Coast Line Railroad Co., No. 24,914.
Missouri Pacific Railroad Co., No. 24,905.
Cincinnati, New Orleans & Texas Pacific Railway Co., No. 24,920.

In the case of the Chicago & Alton Railroad Co., No. 30,234, (1) certified record of merger of Chicago & Alton Railway Co. into Chicago & Alton Railroad Co. and (2) Findings of Fact and Conclusion of Law.

BENJ. CARTER,
Attorney for Claimant.

(Motion filed February 17, 1917.)

IN THE
COURT OF CLAIMS OF THE UNITED STATES.

SEABOARD AIR LINE RAILWAY CO.
v.
THE UNITED STATES.
No. 24,915.
February 23, 1917.

APPENDIX II.--Additional extracts from records in other cases.

EXTRACT FROM PROCEEDINGS OF MEETING OF SOUTHEASTERN PASSENGER ASSOCIATION HELD AT NORFOLK, VA., NOV. 15, 1898.

On motion, Resolved, That it is the sense of this Committee that during the period of time while the adjustment of rates with the War Department for the movement of troops agreed to by the Executive Officers at a meeting held in Washington, D. C., November 2d, is in effect, that in making bids for the movement of troops in Association Territory or into or through Association Territory to or from points beyond, net cash rates may be announced through the Chairman on the following basis for such movements as the Government may request bids.

For distance of 300 miles and under 2 cents per mile per capita plus arbitraries.

For distance of 301 to 343 miles, inclusive, rate of $6.00 per capita plus arbitraries.

For distance of 344 to 499 miles, inclusive, 1¾ cents per mile per capita plus arbitraries.

For distance of 500 to 583 miles, inclusive, rate of $8.73 per capita plus arbitraries.

For distance of 584 and over miles, 1½ cents per mile per capita plus arbitraries.

Regular tariff rates to apply for individuals or parties of less than ten.

When sleeping car accommodations are required, regular standard or tourist sleeping car rates to apply.

Each passenger to be allowed 150 pounds of baggage free of charge. All excess baggage moved with troops on same train or sections thereof to be charged for at the rate of 12 per cent per cwt. of the through passage fare for these movements. The term "baggage" as herein used being understood to mean personal baggage, tentage, camp equipage, accoutrements and rations needed for immediate use of troops, it being understood that rates for live stock, cannon, heavy ordnance, ambulances and wagons (set up or knocked down) shall be obtained from the freight departments and that all property connected with the movements of troops shall be loaded and unloaded without expense to the carriers.

(Report of Auditor for War Department in case of Louisville & Nashville Railroad Co., No. 24,917, "B" Exhibits 1, 2 and 3.)

FROM TESTIMONY OF COLIN STUDDS, IN CASE OF PENNSYLVANIA RAILROAD COMPANY, NO. 24,897.

20. Q. Did you prepare and submit bids for movements of United States volunteers from Dunn Loring and Thoroughfare, Va., to Middletown, Pa., in August and September, 1898? If you did, examine these two papers which I hand you, and say whether you recognize them as copies of your bids, and in that event cause them to be attached to this deposition as exhibits.

A. United States volunteers, Dunn Loring, Va., to Middletown, Pa.; this would seem to be my bid, I recognize it as such.

22. Q. Do you recall in a general way for what camp equipage and similar property accompanying these particular movements the Pennsylvania Railroad Company received pay from the Government?

A. As I recall it, we were forced to accept practi-

cally a fifty per cent reduction from what we were justly entitled to under the bids submitted and accepted by the Quartermaster's Department.

23. Q. Explain what you mean by fifty per cent?

A. I mean this, that my bid distinctly provided that we would allow one hundred and fifty pounds of personal baggage free, and when the bills of lading were returned, having been accomplished, there appeared thereon an endorsement by Colonel Guy Howard, Chief Quartermaster of the Second Division, I think, then at Dunn Loring. As near as I can recollect it was as follows: "Deduct one hundred and fifty pounds per capita;" and then our bill, which was prepared by our Auditor on the basis of our bid, was presented to the Disbursing Quartermaster he undertook to reduce the bill to conform to the endorsement of Colonel Guy Howard on the bill of lading, which practically forced upon the Pennsylvania Railroad the carriage of the entire impedimenta, equipage and stock (I think the stock was included) without compensation. Colonel True, the Depot Quartermaster at Washington, recognized the injustice of this and sought to give us relief, and after sundry conferences he made a proposition to give us a settlement on a basis of 50% of the cars, which settlement we accepted under protest, considering half a loaf better than no loaf at all, and under this settlement we were forced to carry, if I recall, approximately seventy-seven cars of freight free, notwithstanding the acceptance of the terms and conditions of our bid, which provided certain quotations or rates for the camp and garrison equipage and other impedimenta, including stock, and for the carriage only of one hundred and fifty pounds of personal baggage of officers and men free.

* * *

27. Q. In this settlement was any concession of any kind made by the Government to the Pennsylvania Railroad Company by way of setoff against this large concession made to the Government?

A. None whatsoever. It was all a one-sided propo-

sition, and we were put in the position that that was all they would pay us.

(These items of claims allowed in judgment of the court. See findings of fact and conclusion of law, pp. 6, 7.)

FROM REPORT OF COMPTROLLER OF THE TREASURY IN CASE OF PENNSYLVANIA COMPANY, NO. 24,898.

It is submitted that in all the items in this case the plaintiff *voluntarily* accepted the payments as made, and as in full settlement of the claims. In certain items payment was made as claimed; in other items certain deductions were made and the amounts thus found due were accepted in full. In all the items the adjudication and payment was voluntarily made and accepted as in full of all demands. It appears that this voluntary adjudication ought to estop the plaintiff from making any further demands. In this case there was no demand on the part of the Government that the plaintiff reduce his claim in order to receive payment, and the case is therefore not under the rule in which additional allowance was granted by the court because of forced deductions by the Government.

FROM FINDINGS OF FACT IN THE CASE OF NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, NO. 24,918.

VIII. In said movement No. 1 delivery was made at Tampa, Fla., by the Plant System of Railways, and by the practice of the railways and the disbursing officers of the United States, collection for said movement devolved upon said Plant System. Upon tender of payment for said movement by the proper quartermaster officer of the United States a controversy arose between him, on the one part, and claimant and said Plant System on the other part, regarding a deduction for 150 pounds of freight and baggage for each passenger and also on two other questions.

On August 10, 1900, the Auditor of Receipts of said Plant System wrote a letter to claimant's Auditor of

Receipts proposing terms for an adjustment of said controversy, a copy of which letter follows:

* * *

The matter then being before the Auditor for the War Department, claimant's Auditor of Receipts signified to said Auditor and to said Auditor of Receipts of said Plant System his assent to the settlement proposed in said letter, and thereupon said sum of $4,280.18 was allowed by said Auditor and was paid to said Plant System. In this settlement there was allowed and paid, both with respect to the rates for the transportation of wagons and with respect to the weights of the nine carloads of equipage, considerably more than had been offered by the disbursing Quartermaster.

X. Except for the controversy shown by finding 8 above, it does not appear that the claimant, in accepting said reduced amounts allowed by the accounting officers of the United States, filed any protests or objections against the disallowance of the full compensation for the freight transported.

CONCLUSION OF LAW. Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant recover judgment of and from the United States in the sum of eighteen thousand one hundred and fifty-six dollars and three cents ($18,156.03).

[This did *not* include the $4,280.18, *supra.*]

FROM TESTIMONY OF J. R. BRICE (ACTING FREIGHT AUDITOR) IN CASE OF CHICAGO, MILWAUKEE & ST. PAUL RAILWAY CO., No. 24,895. Page 2 of deposition.)

We tried to collect our bills as originally rendered but payment was refused.

FROM FINDINGS OF FACT IN THE CASE OF CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY, No. 24,920.

VI. In arranging settlement for the movement Numbered 18 mentioned in Finding II, the disbursing

Quartermaster made a deduction of $2,933.01 from the bill presented by the Lexington & Eastern Railroad which was the terminal road and had according to practice of railroads assumed the collection of compensation for said movement. The Auditor for said Lexington & Eastern Railroad declined to accept such deduction and agreed to a deduction of $2,116.80 and no more. Subsequently the accounting officers of the Treasury made a settlement on this item making a deduction of $2,158.80 and a warrant in accordance therewith was mailed to said Lexington & Eastern Railroad Company by the Treasury Department.

It does not appear that said railroad company made any protest upon receipt of said warrant or afterwards.

[Claim allowed by court as to said entire deduction of $2,158.80 claimed. See paragraphs VII and VIII of Findings of Fact and Conclusion of Law.]

COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 24,915.

I, Sam'l A. Putman, Chief Clerk of the Court of Claims of the United States, hereby certify that the foregoing is a true copy of (1) a motion filed on the 8th day of February, 1917, (2) a motion filed on the 17th day of February, 1917, (3) a paper entitled "APPENDIX II—Additional extracts from records in other cases," filed February 23, 1917, in this office in the above entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this tenth day of December, A. D., 1918.

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Exhibit B.

IN THE COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 24,915.

EXTRACT FROM BRIEF OF DEFENDANT FILED ON JANUARY 29, 1917.

The stipulation between the claimant company and the Government was entered into with regard to these "personal baggage cases" in the case of the Chicago Northwestern Railway Company, No. 24,893, which stipulation is printed in the claimant's brief at page 48. From the stipulation it does not appear what amount of baggage if any, the volunteer troops were to be regarded as having carried when changing station. Both Messrs. Carter and Ashford insist that by the stipulation referred to it was agreed that volunteer troops going to the front were to be regarded as having no baggage. This stipulation has been before the court several times, and the Government's present counsel has no knowledge as to what was intended by the stipulation with regard to volunteer troops, as the stipulation is silent upon that question. We will accept, subject to the court's approval, the interpretation placed upon the stipulation by the claimant's counsel.

* * *

(Signed) HORACE S. WHITMAN,
Attorney for Defendant.

Exhibit C.

STATE OF VIRGINIA } ss:
City of Portsmouth. }

Before me, J. C. Proctor, Jr., a Notary Public in and for said State and city, appeared this day B. B. McCaa, who, being by me sworn, made oath and said that for years past, including the war between the United States and Spain and the Philippine insurrection, payments to eastern and southern railroad companies for movements of United States troops and for freights appurtenant thereto have been made in the main by the Depot Quartermaster of the United States Army at Washington in the District of Columbia; that by reason of the Spanish war the volume of such business in said office, especially as to the southern roads, increased so that it was necessary for said Quartermaster to employ, and he did employ for some months in 1898 and 1899 a number of clerks for the special purpose of handling claims of the railroad companies and preparing the settlements to be made thereupon, and affiant was one of those clerks; that affiant's especial duty under this employment was to examine the accounts of the Florida Central & Peninsular Railroad Company and prepare the settlements of the same, and therefore the accounts of said company were almost universally handled by him, and he also handled a considerable number of accounts of other railroad companies and had much conference with the clerks who chiefly handled the accounts of those other companies and with the other clerks in said office having charge of such business; that bills or claims were prepared by officers of said Florida Central & Peninsular Railroad Company in its general offices at Jacksonville, Florida, and were sent, usually by express, with way bills and expense bills attached, to said Quartermaster, the way bills being prepared by agents of the railroad lines with which the movements originated and the expense bills being prepared by agents of the Florida Central & Peninsular company

or by other lines with which the movements terminated; that such bills stated the full weights of freight transported, of each class named, without any deductions whatever for any free carriage, no claims being remembered by affiant in which a deduction was made; that the settlements prepared for such bills upon Quartermaster voucher forms, and the instructions given to affiant and said other clerks in said office for the preparation of such vouchers were, regarding the rates to be paid for, the classification of freights and the rates applicable thereto, to consult the bills of lading covering the movements, and said vouchers were in fact prepared (without reference to the claims of the railroad companies and way bills and expense bills) from and in accordance with the contents of and notations upon such bills of lading, which notations usually said, in substance "Deduct one hundred and fifty pounds for each passenger transported." Affiant further says that said bills of lading were written, and the notations upon the same made, by the army officer who shipped the property, and that the notes made later thereupon were written under the direction of the officer to whom the property was consigned; that in such shipments for Government account it was required that any erasure or interlineation or other notes be made by one of such officers and that the agent of the railroad company who received the property for shipment should write nothing upon the bill but his own name, at the place designated in the form. Affiant further says that it was not the practice in such business for the railroad company, in obtaining settlement, to file new bills after the accounts had been stated by affiant and said other clerks, and that affiant does not remember to have seen any bill of said Florida Central & Peninsular Railroad Company, or of any of said other railroad companies, in which said deduction from weights, to the amount of one hundred and fifty pounds per passenger, was made. Affiant further says that the same practice which he has stated herein as regards the Florida Central & Peninsular accounts was pursued

by the Baltimore & Ohio Railroad Company and by the other companies, as a rule, whose accounts were so handled and settled in said office, and that what he has stated regarding bills of the Florida Central & Peninsular Company applies as well to bills of the Baltimore & Ohio Railroad Company. Affiant further says that until after the 9th day of April, 1917, when, as he is informed, an adverse judgment was rendered by the Court of Claims upon a suit of the Seaboard Air Line Railway regarding such deductions to the amount of one hundred and fifty pounds per man, he had had no occasion to communicate and, so far as he recalls, he had never communicated to any officer of said company having charge of or connection with said suit, nor to the company's attorney in Washington who was prosecuting this suit, the facts herein stated regarding the nature of the bills presented by said Florida Central & Peninsular Railroad Company and the steps by which the same were settled and paid.

(Signed) B. B. McCaa.

Subscribed and sworn to before me this 26th day of September, 1917.

J. C. Proctor, Jr.,
Notary Public.

My commission expires April 9th, 1920.

[SEAL]

(Filed October 15, 1917.)

Exhibit D.

IN THE COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES. } No. 24,915.

RENEWED MOTION OF CLAIMANT IN RELATION TO FINDINGS OF FACT.

I.

Claimant by leave of court moves anew that there be stricken from the findings of fact filed in connection with a new opinion of the court delivered on January 7, 1918, all but the first findings. For grounds of said motion it says:

1. Said matter (Findings II to VII inclusive) has no pertinence to the matter decided by the court, viz., that the transactions by which claimant asserts ownership to the claim sued on did not make it the lawful owner of the claim.
2. That, having decided that the claimant was not the lawful owner of the claim sued on, the court was without power to proceed further and determine the facts upon which the merits of the suit rest.

Claimant moves further that the present conclusion of law, following the findings of fact, be stricken out and that, if the court still be of the opinion that claimant is not the lawful owner of this cause of action, the following, or its equivalent, be inserted in lieu thereof:

The court concludes that claimant acquired the cause of action sued on by a voluntary assignment, and is not the lawful owner of the same,

and therefore its petition ought to be and is dismissed.

This, claimant says, would follow as a corrollary upon the elimination of Findings II to VII inclusive.

Claimant further moves the court that, when said Findings II to VII have been stricken out, a second finding shall be made as below:

> After said consolidation no organization was maintained and no business done in the name of the Florida Central & Peninsular Railroad Company.
>
> Poor's Manual of Railroads, 1904, pp. 233, 234; 1907, pp. 97, 99.
> Official Railway Guide, years 1904 to 1914.
> Reports of Second Assistant Postmaster General, Tables of readjusted pay for railway mail service for years 1904 to 1914.
> Affidavit of James F. Wright.

II.

Claimant, as an alternative to all of the foregoing, moves that the judgment, with said findings of fact and conclusion of law and the opinion of the court, be set aside for the time being; that, upon a resubmission of the case on such proofs as the parties may be advised to offer, new findings of fact will be made on all points, but that, if the court be of its present opinion regarding the incapacity of the present claimant to maintain the suit, a conclusion of law and judgment will be entered again dismissing the petition on the ground alone of such incapacity. For ground of this motion claimant says:

> (1) The court, inadvertently it may be, upon its original consideration of the case, did proceed to make findings of fact on the merits after it had reached the conclusion that the Seaboard Air Line Railway has no standing in court, and

those findings were reaffirmed when the second action of the court was taken. It would seem entirely proper therefore to correct errors in those findings (if such errors be shown to the satisfaction of the court) *provided* the judgment when entered shall still be confined to the preliminary question indicated.

(2) Some deposition proof—which may not be taken unless the judgment be suspended—may be necessary in order to remove doubts which the court may have on questions affecting the merits of the claim.

(Motion filed May 9, 1918.)

APPLICATION OF CLAIMANT FOR APPEAL, WITH MOTION FOR RESTRICTION OF TRANSCRIPT.

Claimant prays hereby an appeal to the United States Supreme Court from the judgment rendered by this court on the 27th day of May, 1918, by which a renewed motion of claimant for amendment to the findings of fact was overruled and the judgment previously rendered, dismissing the petition, was affirmed.

In relation to the transcript of this court's record to be prepared for use in said appeal, claimant moves that there be omitted therefrom paragraphs II to VII, inclusive, of said findings of fact. For grounds of this motion claimant says:

1. Said portions of the findings are void because the court had no jurisdiction to make the same.

2. Paragraph I of the findings relates to the identity of the claimant and its competency to maintain the action, while said paragraphs II to VII relate to the merits of the claim, and the decision of the court, adverse to claimant and dismissing its petition, was upon said one question of claimant's standing in court; wherefore the court had no lawful authority to proceed to a consideration of, and make findings upon, the evidence which concerned the merits of the claim.

(Motion filed August 15, 1918.)

COURT OF CLAIMS.

THE SEABOARD AIR LINE RAILWAY
v.
THE UNITED STATES.
No. 24,915.

I, Sam'l A. Putman, Chief Clerk of the Court of Claims of the United States, hereby certify that the foregoing is a true copy of two (2) motions filed respectively on May 9, 1918, and August 15, 1918, in this office in the above-entitled cause.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims at Washington City, this fifteenth day of November, A. D., 1918.

SAM'L A. PUTMAN,
Chief Clerk, Court of Claims.

[SEAL]

Exhibit E.

EXTRACT FROM FINAL FINDINGS OF FACT MADE BY COURT OF CLAIMS.

I.

The Seaboard Air Line Railway is a corporation formed, as hereinafter shown, by the consolidation of a corporation of the same name with another corporation, the Florida Central & Peninsular Railroad Co.

The Seaboard Air Line Railway was a corporation originally organized under the laws of the State of Virginia, and by duly authorized consolidations or merges with corporations operating railroads in those States had become a consolidated corporation under the laws of the States of Virginia, North Carolina, South Carolina, Georgia and Alabama. At the times of the occurrences hereinafter stated it operated a system of railways in the States of Virginia, North Carolina, South Carolina, and Georgia.

The petitioner, the Seaboard Air Line Railway, a corporation formed as hereinbefore stated, now owns and operates railroad lines in the said States and also the railroad lines that, until the consolidation herein mentioned, belonged to another corporation, the Florida Central & Peninsular Railroad Co.

On the 27th day of June, 1903, a company, described as "the Seaboard Air Line Railway, a consolidated corporation organized and existing under the laws of the States of Virginia, North Carolina, South Carolina, Georgia, and Alabama," and the Florida Central & Peninsular Railroad Company, described as "a corporation duly incorporated and operated under and by virtue of the laws of the States of Florida and Georgia," entered into an agreement called "Articles of agreement of merger and consolidation," prescribing "the terms and conditions of said merger and consolidation and the mode of carrying the same into effect."

Article I was as follows:

"The capital stock, franchise, railroads, estates,

and properties, real, personal, and mixed, of the said Florida Central & Peninsular Railroad Co., shall be and they are hereby, united, merged, and consolidated with the Seaboard Air Line Railway, and are to be hereafter owned and controlled as one railroad company."

Article II was as follows:

"The name of said company so formed by the merger and consolidation and union of said railroad companies shall be, and is, the Seaboard Air Line Railway."

Article III prescribed the number of directors of said consolidated company, their officers, and the names of those who shall act as directors and officers until the first annual meeting of the stockholders.

Article IV prescribed where the offices of the company should be located, and Article V prescribed where and when the annual meeting should be held and procedure thereat.

Article VI provided that the capital stock of said consolidated company should be $100,000,000, divided into 1,000,000 shares of $100 each, divided further into 750,000 shares to be "presently issued" and 250,000 shares "issuable hereafter," the 750,000 shares to be further divided into 250,000 shares of preferred stock and 500,000 shares of common stock.

Article VII provided for the distribution of profits, and Article VIII provided "the manner of converting the capital stock of each of said companies into that of the consolidated company," in which, as to the stock of the Florida Central and Peninsular, it is provided:

"2. To the holders of preferred stock of Florida Central & Peninsular Railroad Co. one share of the preferred stock and one share of the common stock of the consolidated company for each share of the preferred stock of said Florida Central & Peninsular Railroad Co.

"To the holders of the common stock of said Florida Central & Peninsular Railroad Co. one share of the common stock of the consolidated company for each share of the common stock of said Florida Central & Peninsular Co.

"But in the exchange of stock, both common and preferred, of the Florida Central & Peninsular Railroad Co. for the common and preferred stock, respectively, of said Seaboard Air Line Railway, no exchange is to be made for the stock of the said Florida Central & Peninsular Railroad Co., either common or preferred, now held and owned by said Seaboard Air Line Railway."

Article IX contained authority for the execution of an indenture of mortgage and Article X was as follows:

"Upon, from, and after the execution of these articles of merger and consolidation, and the ratification thereof by the stockholders of the constituent companies and the filing of the same as required by law, the rights, privileges, and franchises of each of said constituent companies and all the property, real, personal, and mixed, and all debts due on every account, as well as stock subscriptions and other things in action belonging to each of said companies shall be transferred to and vested in such consolidated company without further act or deed as effectually as they were in the former companies; and all rights of creditors and all liens on the property of said companies shall be preserved unimpaired; and all debts, liabilities, and dues of said companies shall thenceforth attach to the consolidated company and be enforceable against it to the same extent as if said debts, liabilities, and dues had been incurred by it."

Article XI directed that "The president or other proper officer of said consolidated company shall file a counterpart or copy of these Articles of Agreement of Merger and Consolidation, duly authenticated, with the proper officers in the States of Virginia, North Carolina, South Carolina, Georgia, Alabama, and Florida." The copy in evidence is certified by the secretary of state of the State of Florida as—

"a true copy of articles of agreement and consolidation of Seaboard Air Line Railway and Florida Central & Peninsular Railroad Co., dated June 27, 1903, forming the Seaboard Air Line Railway, a corporation created by and existing under the laws of the States of

Virginia, North Carolina, and other States, as therein mentioned, which agreement was duly filed in this office on the 15th day of August, 1903."

The said consolidation was made under authority of the statutes of the State of Georgia, and the statutes of the State of Florida.

The Seaboard Air Line Railway, as created under the terms of said agreement, is the petitioner in this case, and its petition was filed April 18, 1904.

II.

At the times hereinafter stated movements of United States troops, with freight belonging to the United States, and baggage of the troops, occurred over the line of railroad then operated by said Florida Central & Peninsular Railroad Co., all either being wholly over or terminating on the lines of said company, and none of said movements were over the lines of railroad then owned by the plaintiff herein.

III.

All settlements for movements here involved were made by a disbursing quartermaster of the Army, on presentation of the original bills of lading, on the basis of weights shown thereon. In cases where it appeared by notation on the bill of lading that an amount of baggage claimed free was carried in carload lots, such cars did not appear in the voucher among the items of charge on account of the particular bill of lading referred to by number, and no payment therefor was made. In other cases deduction was made from the total weights of certain classes of freights carried, upon the basis of 150 pounds for each officer and enlisted man shown to have been transported.

BRIEF.

For protection against confusion of the issues appellant is compelled to ask the intervention of this court at the threshold of the appeal. The Court of Claims finally, at a second hearing, dismissed the petition on the ground, clearly set forth and discussed in its opinion, that the claimant had no legal capacity to maintain the suit; but it rendered, or rather retained, findings of fact going to the merits of the case as well as to the preliminary question of parties. The opinion suggests that different findings might be made, upon the merits, if the court should proceed to more mature consideration of the case. The court denied claimant's application for a new trial and has refused to exscind the findings made or to omit them from the appeal rec

It is submitted (1) that, if these parts of the findings are both gratuitous and out of harmony with the facts, they should not remain in the record to suggest here that there is no cause of action for any suitor; and (2) that, if they are merely gratuitous, the court will serve its own convenience and the parties' by eliminating them before the record is printed.

All that the Court of Claims in reality decided is that present claimant acquired the claim by an "assignment" which is nullified, in relation to the United States, by Section 3477 of the Revised Statutes; but the conclusion of law and judgment are in those broad terms which would have been employed if there had been an explicit submission of the case on the merits, including every defense whatsoever in bar of the action. Appellant's counsel are not able to take any other view of this judgment, with these findings of the like broad scope, than that it decides in favor of the United States every possible issue in the case. They therefore ask

the court to reduce the record within such bounds that the adjudication will be clear as determining that this appellant has no standing in court—that and nothing more.

The decisions of this court seem very broad to the effect that in its review of a case coming from the Court of Claims the court will consult the findings of fact, conclusion of law and judgment alone. These, the court says, will not be treated as "modified by anything said in the opinion."

Crocker v. *United States*, 240 U. S. 74.
Stone v. *United States*, 164 U. S. 380.
Chapman v. *Bowen*, 207 U. S. 89.
British Queen Mining Co. v. *Baker Silver Mining Co.* 139 U. S. 222.

Surely if, from the present transcript which has come from the Court of Claims, this court should determine that nothing was considered and decided there except a question of the claimant's competence to maintain the suit, the record proper will have been modified by the opinion.

A case having been tried both on jurisdictional grounds and on grounds going to the right of action itself, no separate issues being framed, and the bill having been dismissed: *Held*, that the decree determined all questions in the defendant's favor.

Northwestern Laundry Co. v. *Des Moines*, 239 U. S. 486.
See also *Murray* v. *Pocatello*, 226 U. S. 318.

The Court of Claims, in the new opinion, takes the ground that, having found a reason why the present suitor may not recover a judgment upon any state of facts, the court has no commission to go into the facts, and make findings, reaching the merits of the claim.

But has it not done this interdicted thing, by readopting findings made previously on the merits, as unmistakably as it would have done by proceeding to consider all the facts again and make new findings of the same scope? In other words, would not any new findings on the merits have been void; and if that is true, are not the present findings on the merits void? If so, again, would this court have them included in its printed record on which it will consider the case?

The Findings are Incorrect and Would Do Appellant an Injury.

If confessing that the findings on the merits of the claim are correct—that they do substantial justice to the facts of the case—appellant could hardly venture to ask this court to exscind those findings because they are superfluous. Should this court regard these findings, though superfluous, as speaking correctly on the merits of the claim, there is all too much reason to apprehend it would say that there is no valid cause of action here for any claimant whomsoever, and therefore that an incorrect decision regarding the *locus standi* of the person who has sued is *damnum absque injuria*.

When the court considers the methods, unusual, to say the least, by which the Court of Claims proceeded to its conclusion on the merits of the claim, it will not be surprised that the findings missed the mark. Following are some of those acts, as narrated in the motion.

The court in its deliberations (not by any previous announcement) disregarded a stipulation of fact on which the fifteen preceding cases of other claimants, on the same basis cause of action, had been tried, and which the briefs had treated as a part of this case.

The court disregarded a large volume of other evidence which had been imported into this case, by the court's ordinary procedure, from other cases.

The court presumed in the Government's favor something which it had given the Assistant Attorney General an opportunity, by suspending the hearing, to prove, which finally he confessed he could not prove, and which is not true.

The court, in relation to some of the movements of freight in question chose to ignore the contract itself which fixed the terms of the shipments, and rested its conclusion upon a letter written some days later by an army officer to another army officer, which purported to state those terms.

In fixing its definition of "baggage" the court referred to, and set out in the findings, a proposition made by the railroad companies in 1908, which was not accepted by the Government's officers; but with respect to the compensation which that agreement would have yielded upon the reduced computations of the freights—much more than was paid because special, high *rates* were named—it disregarded that tender. Moreover the findings do not say, as *did* the first opinion, that this tender was subsequent to most of the transactions of this case.

Not unnaturally, this result has followed from proceedings so remarkable:

On proof at least as ample as had ever been made before, the Court of Claims has determined here adversely to the present claimant the same main question which it previously had determined, fifteen times, in favor of other claimants. Similarly the subsidiary issues here presented have been tried over and over again, from four to seven times each, and in every

case but this one the result was favorable to the claimant.

Before or in the process of taking its appeal, three applications were made by appellant to the Court of Claims itself for that change in the findings of fact, or in the record thereof, which is here requested, and each application was overruled.

There is one difference of fact between the present case and the cases previously decided, but that is of such sort as, to say the least, does not plead for the denial to the present claimant of the relief given to the others. As has been said in the motion (paragraph 12) the fact does not occur here that the railroad company rendered its bills upon those identical, diminished weights of freight of which the suit complains. On the other hand, its bills stated the full weights of the freights and claimed compensation for those. (See affidavit of B. B. McCaa filed in support of motion to set judgment aside, Exhibit C herein.)

This motion and brief speak of the final findings of the Court of Claims as a mere repetition of those previously made; and what the court has said at the conclusion of the second opinion so signifies. According to the record, the original findings were withdrawn and new findings filed; but for the present purpose the court's recital in the opinion, and the references herein, are correct. No change whatever was made in those findings which relate to the merits of the claim. The only change made was the insertion of the two last sub-paragraphs in the first finding.

If this motion for diminution of the record does not lie, the reason must be that the findings to which it relates are superfluous and nugatory and will not be considered by this court. But if that be true, some

expense can be saved by the elimination of those findings before the printing is done, and the Government will have suffered no prejudice.

BENJAMIN CARTER,
Attorney for Appellant.

F. CARTER POPE,
Of Counsel.

Notice of this motion, by serving a copy thereof was given to the Assistant Attorney General of the United States having charge of the defense on the 23d day of December, 1918, with notice that the motion will be presented to the court on the 13th day of January, 1919, or so soon thereafter as the court may be sitting to receive it.

BENJAMIN CARTER,
Attorney.

SEABOARD AIR LINE RAILWAY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 62. Argued March 16, 1920; restored to docket for reargument November 15, 1920; reargued April 12, 1921.—Decided June 6, 1921.

Section 3477 of the Revised Statutes, forbidding all transfers and assignments of any claim upon the United States before its allowance, etc., was intended to prevent frauds upon the Treasury, and does not apply to a transfer resulting from the consolidation of two railroad corporations whereby, pursuant to their agreement and the laws of their respective States, the rights, franchises, property, and choses in action of each are transferred to and become vested in the consolidated corporation. P. 656.

53 Ct. Clms. 107, reversed.

THE case is stated in the opinion.

Mr. Benjamin Carter, with whom *Mr. Frank Carter Pope* was on the brief, for appellant.

Mr. Assistant Attorney General Davis, with whom *Mr. Crowley Wentworth*, Special Assistant to the Attorney General, was on the brief, for the United States.

MR. JUSTICE MCREYNOLDS delivered the opinion of the court.

Appellant sued in the Court of Claims to recover balances for transportation services originally payable to the Florida Central & Peninsular Railroad Company, to whose rights it had succeeded through merger or consolidation. Holding that because of § 3477, Rev. Stats. (9 Stat. 41, and 10 Stat. 170), appellant could not maintain the action, that court dismissed its petition.

Section 3477—"All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof."

The Seaboard Air Line Railway was originally chartered under the laws of Virginia; by authorized union with others, it became a consolidated corporation under the laws of Virginia, North Carolina, South Carolina, Georgia, and Alabama; and in 1903 under "Articles of agreement of merger and consolidation" and the statutes of Georgia and Florida (§ 2173, Code of Ga. 1895; § 2812, Gen. Stat. of Fla.), the Florida Central & Peninsular Railroad, a Florida corporation, was united with it. As agreed and provided by the laws of the two States, the rights, privileges, franchises, and all property, real, personal, and mixed, and all debts on every account, as well as stock subscriptions and other things in action belonging to each of the constituents, were transferred to and vested in the consolidated corporation without further act or deed, "as effectually as they were in the former companies."

Section 3477 has been before this court many times for construction and application. *United States* v. *Gillis*, 95 U. S. 407; *Erwin* v. *United States*, 97 U. S. 392; *Spofford* v. *Kirk*, 97 U. S. 484; *Goodman* v. *Niblack*, 102 U. S. 556; *St. Paul & Duluth R. R. Co.* v. *United States*, 112 U. S. 733; *Bailey* v. *United States*, 109 U. S. 432; *Butler* v. *Goreley*, 146 U. S. 303; *Hager* v. *Swayne*, 149 U. S. 242; *Ball* v. *Halsell*, 161 U. S. 72; *Price* v. *Forrest*, 173 U. S. 410,

In *Erwin* v. *United States*, *Goodman* v. *Niblack*, and *Price* v. *Forrest*, certain exceptions to the general language of the section were recognized because not within the evil at which the statute aimed. It was intended to prevent frauds upon the Treasury, and the mischiefs designed to be remedied "are mainly two: First, the danger that the rights of the government might be embarrassed by having to deal with several persons instead of one, and by the introduction of a party who was a stranger to the original transaction. Second, That, by a transfer of such a claim against the government to one or more persons not originally interested in it, the way might be conveniently opened to such improper influences in prosecuting the claim before the departments, the courts, or the Congress, as desperate cases, when the reward is contingent on success, so often suggest."

We cannot believe that Congress intended to discourage, hinder or obstruct the orderly merger or consolidation of corporations as the various States might authorize for the public interest. There is no probability that the United States could suffer injury in respect of outstanding claims from such union of interests and certainly the result would not be more deleterious than would follow their passing to heirs, devisees, assignees in bankruptcy, or receivers, all of which changes of ownership have been declared without the ambit of the statute. The same principle which required the exceptions heretofore approved applies here.

The judgment of the court below is reversed and the cause remanded with direction to afford reasonable opportunity to both sides for taking any additional proof rendered necessary by the withdrawal by the United States of a stipulation upon which reliance had been placed; and for further proceedings in conformity with this opinion.

Reversed.